2 or 3 days for which we were just advised by the majority leader we are likely to be passing a continuing resolution.

And today we should resolve that the power not to pass money bills, which the Congress clearly has—and I do not dispute that Congress has that power, but that power should never become or never be seen as a right not to pass money bills, as Mr. GINGRICH asserts. Today we should fully restore the checks and balances between the President and the Congress which the Constitution of the United States contemplated at the time of the founding of the Republic.

Mr. President, I yield the floor. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will read the roll.

The legislative clerk proceeded to call the roll.

Mr. D'AMATO. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. THOMAS). Without objection, it is so ordered.

DIRECTING THE SENATE LEGAL COUNSEL TO BRING A CIVIL ACTION

The PRESIDING OFFICER. Under the previous order, the Senate will proceed to the consideration of Senate resolution 199, which the clerk will report.

The legislative clerk read as follows:

A resolution (S. Res. 199) directing the Senate Legal Counsel to bring a civil action to enforce a subpoena of the Special Committee to Investigate Whitewater Development Corporation and Related Matters to William H. Kennedy, III.

The Senate proceeded to consider the resolution.

PRIVILEGE OF THE FLOOR

Mr. D'AMATO. Mr. President, I ask unanimous consent that the privilege of the floor be granted to staff during consideration of Senate Resolution 199, whose names shall be submitted to the desk at this time.

The PRESIDING OFFICER. Without objection, it is so ordered.

The staff names are as follows:

Alice Fisher, Chris Bartolomucci, Jennifer Swartz, David Bossie, Vinezo Deleo, Richard Ben Veniste, Lance Cole, Neal Kravitz, Tim Mitchell, Jim Portnoy, Glenn Ivey, Steve Fromewick, David Luna, Jeffrey Winter, and Amy Wendt.

PRIVILEGE OF THE FLOOR

Mr. SARBANES. Mr. President, I ask unanimous consent that Joanne Wilson, a congressional fellow with Senator SIMON's office, be granted privileges of the floor for the consideration of Senate Resolution 199.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. D'AMATO. Mr. President, I regret that we find ourselves here today. I must say that I believe my colleague, Senator SARBANES, has made every reasonable effort to see if we could resolve this problem. And, indeed, in the past we have been able to resolve many of the outstanding issues with our professional staff and counsel working together—even some that might be considered contentious. I believe this one is beyond the control of my friend and colleague on the other side. We have made every reasonable effort to attempt to settle this matter. That is a question of the enforcement of a subpoena on Mr. Kennedy for his notes—William Kennedy was formerly associated with the Rose law firm, former associate counsel in the White House—regarding a meeting of November 3, 1993.

I summarize that because it is well known. To go over every single aspect of it, I think, would draw this out unnecessarily.

It was but a short time ago that my colleague and friend, Senator SARBANES, requested that I speak to Chairman LEACH in the House of Representatives in regard to an offer that was made, apparently, to the Speaker in regard to a possible settlement of the manner in which to produce these notes. Let me first say that I find the conduct of the White House to be absolutely one based upon delay and obfuscation—delay, delay, delay, delay, delay.

Let me tell you, with some specificity, what I am talking about. We asked for this information, and information was covered going back to August. We had numerous conferences with the White House with regard to not only this, but all of the relevant information. Throughout these proceedings, we have had the continued posture, publicly, of cooperation and, yet, when it came to producing relevant material evidence that goes to the heart of the matter, we have had delay.

This is not the first time. Only when the issuance, or the threat of the issuance, of a subpoena and bringing this public would we get cooperation—in numerous instances. But this one takes the cake. Let me tell you why. Because after our August 25 request, ensuing meetings took place in September, October, and November. On November 2, it gets down to specificity as it relates to these notes of Mr. Kennedy. November 2. Here we are now in December. It comes to the issue of privilege for the first time and, remember, this is the same administration, and these people are working for the same President, who says, ''I will go to great lengths, and I cannot imagine raising the issue of privilege.'' And privilege is raised.

Now, clearly, in looking at the legislative history of the Congress of the United States as it relates to the Executive, there has never been an instance where a committee, in its capacity of investigating, has been turned down or has the claim of privilege succeeded in thwarting that committee's request for documents. Never. There is a history on that. Clearly, bringing up the issue of privilege in this case is very, very doubtful, very, very tenuous. But I suggest, Mr. President, it flies in the face of what Mr. Clinton, the President of the United States, promised and said publicly: ''We will cooperate.'' What sense is it if you have 50,000 pages of documents? You can give us the Federal Registry. So what? You can give us a million pages. But when it comes to the relevant information that we request, there is repeated delay, delay, obfuscation.

That is what we have had to deal with. This is a perfect example. Only when we say that we would vote these subpoenas, move this, do we begin to get any kind of response. Let me say that it is absolutely disingenuous, it is wrong, and it is a contrivance for the White House to say that it has offered us conditions by which to accept this agreement. The fact of the matter is, those conditions that they have added to it are over and above what was reasonable, and that back on November 2—again, almost 6 weeks ago—we said to them, ''You do not have to concede anything. Give us the information and indeed it will not be deemed a waiver.'' So we offered that to them.

The whole month of November goes by, right up until the recess this time, and delay, delay, delay. They come back and they say, ''Oh, by the way, we will be willing, if you will agree that this is not a waiver of privilege, first, and then attach other conditions—conditions to say that we, the Senate, should get approval from other bodies.''

Now, I do not have any objection and, indeed, would suggest and recommend that other bodies have no reason—be they my colleagues in the House or investigatory bodies, or the independent counsel—to go along with this. But to make this public and then to claim that they have conceded something that we offered weeks ago is wrong. Spin doctors. They are very good at this spinning.

In an effort, just a little less than an hour ago, to come about some kind of suggestion, some kind of resolve of this matter, my friend and colleagues suggested that I reach out to Chairman LEACH, chairman of the House Banking Committee, which is also conducting its investigation into the matter known as Whitewater/Madison, and related matters.

I said that I would, and I did. I have seen now for the first time a letter of response or a letter from Chairman LEACH to Speaker GINGRICH. I do not know if my friend and colleague has a copy of this letter. I will make a copy available. We just received this by fax at 10:30. Mr. President, I ask unanimous consent that the complete letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

COMMITTEE ON BANKING AND
FINANCIAL SERVICES,
Washington, DC, December 19, 1995.

Hon. NEWT GINGRICH,
Speaker, Office of the Speaker,
Washington, DC.

DEAR MR. SPEAKER: I have reviewed the letter of December 18, 1995, to you from Jack Quinn, Counsel to the President.

Committees of the Congress may from time to time consider entering arrangements of one kind or another with the White House. However, House determinations should not be contingent on Senate agreement or vice versa.

What the White House is attempting to do in this instance is position the House of Representatives—and particularly the Committee on Banking and Financial Services and the Committee on Government Reform and Oversight—in opposition to the Senate and the Independent Counsel. This is a circumstance we should prudently avoid.

In his cover letter Mr. Quinn suggests that ''our interest is not in maintaining the confidentiality of the notes, but rather in ensuring that the disclosure of the notes not be deemed to waive the President's right to confidentiality with respect to other communications on the same subject covered in the notes.'' In the letter of December 14, 1995, from Ms. Jane Sherburne to Mr. Michael Chertoff it is noted that ''our concern about disclosing the Kennedy notes has not had to do with the notes themselves, but instead the possibility that disclosure would result in an argument that there had been a waiver (in whole or in part) of the President's privileged relationship with counsel.''

It is my view that while these may be credible concerns for the Counsel to the President to raise, they are inconsistent with the objectives of the Congress concerning full and complete disclosure in this matter. Just as the White House is concerned with precedent from its perspective, so must Congress be for its oversight prerogatives.

To my knowledge, this request by the White House of the House for a commitment relative to a Senate request is unprecedented. It underscores the gravity of the issues at stake and hints at White House concerns that a new path of inquiry could be opened by the information transferred. In this context, what the White House is inappropriately attempting to do is hamstring one congressional body by holding hostage documents subject to a constraining agreement by the other body.

What appears to be at issue with regard to the requested documentation is that there may have been a transfer of confidential law enforcement information related to an investigation touching on an office holder to outside attorneys representing the office holder in his personal capacity. The then House Committee on Banking, Housing and Urban Affairs was assured in 1994 that such disclosure did not occur and would not be appropriate. In this regard, for example, Bernard Nussbaum, former White House Counsel, testified that he had on his staff at the White House Neil Eggleston and Bruce Lindsey, both of whom attended the meeting the notes for which are at issue. Under oath Nussbaum stated that Lindsey and Eggleston ''would not release confidential information which they received in the course of [their] official capacities to anyone outside the White House for any improper purpose, or for any purpose.''

The White House's reluctance to turn over the requested documents may cast doubt on the accuracy of this and similar testimony by other White House officials before a committee of the House of Representatives.

On process grounds, I have sought to be as deferential as prudently possible to the White House, but with each new revelation, some of which if viewed in isolation might seem relatively inconsequential, the evidence of a consistent pattern of delay and obfuscation is clearly emerging.

Accordingly, my advice is that a respectful letter be sent to Mr. Quinn denying his request.

Sincerely,

JAMES A. LEACH,
Chairman.

Mr. D'AMATO. Mr. President, let me read part of the letter. I made that call because if there was an attempt to settle this and we could get the documents—let me start by saying this: If we are given the documents at any time—any time; at any time—why, we will cease and suspend. It is not necessary to go forward. We are asking the Secretary or the Senate legal counsel to seek enforcement of this subpoena, whether after the vote, prior to the vote—whatever.

Let me suggest that the White House and the President has it within his discretion and within his hands to deliver those documents to us. We could end it tomorrow. If people say you are unnecessarily going forward—no, it is because we have had nothing but delay, delay, conditions that we have not been able to accept. We have had a rebuttal of our efforts going back to November 2 when we offered to say we will put aside the question of privilege, you have not waived it. Yet it is at the last moment when we finally say we will vote to issue a subpoena that they come forth with what I consider to be another tactic of delay.

Let me read part of Chairman LEACH's letter:

What appears to be at issue with regard to the requested documentation is that there may have been a transfer of confidential law enforcement information related to an investigation touching on an office holder to outside attorneys representing the office holder in his personnel capacity. The then House Committee on Banking, Housing and Urban Affairs was assured in 1994 that such disclosure did not occur and would not be appropriate. In this regard, for example, Bernard Nussbaum, former White House counsel, testified that he had on his staff at the White House, Neil Eggleston and Bruce Lindsey, both of whom attended the meeting the notes for which are at issue. Under oath Nussbaum stated that Lindsey and Eggleston ''would not release confidential information which they received in the course of [their] official capacities to anyone outside the White House for any improper purpose, or for any purpose.''

I have a copy of a hearing before the Committee on Banking, Finance and Urban Affairs, dated July 28, 1994, page 18. Chairman LEACH furnished this to me, again by fax at 10:32, less than half an hour ago.

Mr. Nussbaum's testimony:

On my staff, I had a number of very experienced people, Congressman. I had Cliff Sloan, who was a former assistant solicitor general, a partner in a distinguished law firm. I had Neil Eggleston, a former assistant U.S. attorney in the Southern District of New York and an experienced litigator, Bruce Lindsey, who is on the White House staff is a lawyer of high competence and high integrity. I didn't feel it necessary to issue those kind of instructions to those people.

I knew and I still know to this day that those people would not release confidential information which they received in the course of our official capacities to anyone outside the White House for any improper purpose, or for any purpose.

A letter that Chairman Leach sent to me says:

The White House's reluctance to turn over the requested documents may cast doubt on the accuracy of this and similar testimony by other White House officials before a committee of the House of Representatives.

On process grounds, I have sought to be as deferential as prudently possible to the White House, but with each new revelation, some of which viewed in isolation might seem relatively inconsequential, the evidence of a consistent pattern of delay and obfuscation is clearly emerging.

Accordingly, my advice is that a respectful letter be sent to Mr. Quinn denying his request.

Sincerely, Chairman Leach.

The chairman advised me he might have additional letters on this matter.

I have made an attempt, as its relates to asserting what the position of my colleagues—I have explained our position that we have no problem in going forward under the conditions that we had offered to this administration, to this White House, back in early November, and which was the subject matter of discussions, repeatedly, for weeks and weeks and weeks as it related to this and other matters.

So when we want to talk about avoiding constitutional clashes, I say right now, Mr. President, please, keep your promise to the American people. Give us the information that Congress is entitled to, that the people are entitled to.

Let me, if I might, refer to the New York Times of yesterday, and, Mr. President, I will ask that the complete editorial be printed in the RECORD.

The editorial is entitled: ''Averting a Constitutional Clash.''

If Mr. Clinton relinquishes the documents, it would be a positive departure from the evasive tactics that have marked the Clintons' handling of questions about Whitewater since the 1992 campaign. Mr. Clinton's assertion that the subpoenaed material is protected by lawyer-client privilege, and his quieter claim of executive privilege, are legally dubious and risk a damaging precedent.

As it relates to this, let me read just part of the editorial of December 14 of the Washington Post:

The privilege claims also undercut Mr. Clinton's much-professed interest in getting the facts out.

Mr. President, I suggest again that attempting to raise this claim and raising and delaying this matter for months—for months, now—and forcing us to demonstrate that we are absolutely serious in terms of our determination to get the facts that we are entitled to, that the Congress of the United States and the Senate of the United States, the American people are entitled to, will not be delayed any longer.

Again, I said at any point, at any time the White House says we will deliver and we are going to deliver these

within a period of time—and I do not mean days; I do not mean weeks; I mean within an hour or 2 hours—we will stop, but not until that takes place.

The privilege claims also undercut Mr. Clinton's much-professed interest in getting the facts out. To the contrary, these actions of administration officials and associates—like other of their actions in this long, evolving Whitewater affair—look cagey, not candid, and are suggestive of people with something to hide.

Let me go on:

It is fair to ask whether the White House exploited information it obtained improperly from Federal agencies that were looking into possible criminal matters involving the Clintons.

That is the Washington Post editorial Thursday, December 14.

We can go on and on. December 12, New York Times, an editorial:

The committee reasonably wants to know about government matters that may have been discussed, such as the handling of investigations by the Treasury Department . . .

That is exactly what Chairman LEACH points out. Those questions were raised. Now we know, at least this Senator knows, for the first time, Mr. Nussbaum said, no, materials would not be turned over of this nature, or words to that effect.

A court will decide whether notes taken at the meeting and a White House memo about the session can be deemed personal legal papers. That will take an expansive interpretation on Mr. Clinton's behalf.

To be sure, citizen Bill Clinton is entitled to claim whatever privacy the courts will give him. But President Clinton, the politician and national leader, cannot expect the public to be reassured by mysterious mobile files and promises of openness that disappear behind the lawyer-client veil.

Mr. President, I ask unanimous consent these editorials be printed in the RECORD in their entirety for completeness.

There being no objection, the articles were ordered to be printed in the RECORD, as follows:

[From the New York Times, December 19, 1995]

AVERTING A CONSTITUTIONAL CLASH

President Clinton may be moving to avoid a constitutional confrontation with Congress over the Senate Whitewater committee's access to notes taken by a White House lawyer at a Whitewater meeting two years ago that was attended by senior officials and personal lawyers for Mr. Clinton and his wife, Hillary Rodham Clinton.

If Mr. Clinton relinquishes the documents, it would be a positive departure from the evasive tactics that have marked the Clintons' handling of questions about Whitewater since the 1992 campaign. Mr. Clinton's assertion that the subpoenaed material is protected by lawyer-client privilege, and his quieter claim of executive privilege, are legally dubious and risk a damaging precedent.

A forthcoming response to the Senate's request would seem especially timely in view of new disclosures that more records have disappeared from the Rose Law Firm. These documents deal with Mrs. Clinton's legal work for Madison Guaranty, the failed savings and loan run by their Whitewater partner. This news comes one week after the disclosure that Vincent Foster removed three files from the firm during the 1992 election campaign and turned them over to the Clintons' trusty political errand-runner, Webster Hubbell.

The dispute with the committee involves notes taken by William Kennedy 3d, an associate White House Counsel, at a November 1993 meeting at the offices of the Clintons' private attorneys. This meeting was attended by three members of the White House Counsel's office, three lawyers for the Clintons and Bruce Lindsey, one of the President's senior political aides. Clearly, lawyer-client confidentiality ought to apply to Mr. Clinton's exchanges with his personal lawyer. But to try to extend the privilege to such a broadly constituted meeting is a stretch, especially given the committee's mandate to find out whether Administration officials, including some at the meeting, may have improperly used confidential Government information to aid the Clinton's private defense.

Mr. Clinton's various lawyers, and some legal ethics experts, speak of the overlap of the President's public and private roles to justify the claim of lawyer-client privilege. But this argument misses the vastly different and even conflicting responsibilities of Mr. Clinton's two sets of attorneys.

As for executive privilege, it ought to be a way to protect a narrow band of Presidential privacy on important matters of governance, including national security. It is a distortion of the doctrine's history to raise it to block a legitimate Congressional inquiry into the Clintons' Arkansas financial dealings and the official conduct of senior Administration aides.

A decent resolution that had the White House handing over the notes seemed to be in sight over the weekend. But yesterday Senator Alfonse D'Amato, the committee chairman, complained that the White House was trying to bargain in the media instead of negotiating with the committee. It should still be possible to make arrangements before tomorrow, when the full Senate is due to take up the matter. If not, the Senate has no choice but to vote to go to court to enforce the committee's subpoena.

[From the Washington Post, December 14, 1995]

NOW A SUBPOENA CONTROVERSY

In refusing to honor a Senate Whitewater committee subpoena for notes taken by then-White House associate counsel William Kennedy during a Nov. 5, 1993, meeting between White House officials and the Clintons' attorneys, the administration risks traveling down a familiar dead-end. Seeking refuge from a legislative inquiry behind the twin shields of executive privilege and attorney-client privilege—as the administration is doing—may slow Congress. But it will do nothing to avoid a confrontation and a debilitating fight that is likely to end up in court.

Claims of executive and attorney-client privilege play directly into the hands of Republicans on the Hill who, despite their wails of protest, are not the least bit bothered by the image of a stonewalling Democratic administration. The privilege claims also undercut Mr. Clinton's much-professed interest in getting the facts out. To the contrary, these actions of administration officials and associates—like other of their actions in this long, evolving Whitewater affair—look cagey, not candid, and are suggestive of people with something to hide. The political affiliation of Sen. Alfonse D'Amato and company notwithstanding, there are aspects of the November 1993 meeting that raise legitimate questions.

It is fair to ask whether the White House exploited information it obtained improperly from federal agencies that were looking into possible criminal matters involving the Clintons. If, for instance, administration officials used confidential government information to try to shield Bill and Hillary Rodham Clinton from exposure to probes into Madison Guaranty, the failed Arkansas thrift partially owned by the Clintons, and the Small Business Administration-backed loan company owned by Judge David Hale, then they have something serious to answer for. Obviously Mr. Kennedy's notes on the Nov. 5 meeting can shed light on those questions. His notes, however, are what the administration seeks to withhold.

This impasse between the Senate committee and the White House over so-called privileged documents must and will be resolved. It would be better, however, if the dispute could be settled between the executive and legislative branches. A reasonable accommodation of each side's interests, not a legal challenge, is what's needed at this time. The overriding interest is to get at the truth. If, however, a satisfactory solution cannot be reached, then the courts must decide. It shouldn't have to come to that.

[From The New York Times, December 12, 1995]

TRAVELING WHITEWATER FILES

Just when it seemed possible that the White House could not handle Whitewater any more clumsily, here come two new moves to undermine public confidence.

The disclosure that Vincent Foster removed three files from Hillary Clinton's law firm during the 1992 election campaign and turned them over to the Clintons' political fixer, Webster Hubbell, is truly a blow to those who want to believe the Clintons have nothing to hide. The files related to Mrs. Clinton's work for Madison Guaranty, the savings and loan owned by the Clintons' Whitewater investment partner, James McDougal. The White House will no doubt argue that the files are innocuous.

But that claim seems lighter than air compared with the fact that they were stored in the basement of a lawyer later convicted of a felony and that they disappeared from the Rose Law Firm in a year when the Clinton campaign team was perfecting its stonewall defense on Whitewater.

The other matter has to do with the dubious claim of lawyer-client privilege being advanced by President Clinton about a 1993 meeting at which his senior lawyers and aides discussed Whitewater. Mr. Clinton seems headed for a messy legal showdown with the Senate Whitewater committee. But the President is stretching attorney-client privilege beyond any reasonable limit and also revoking his promise of openness about this matter.

Surely no one wants to intrude on exchanges between the President and his personal lawyers. But this meeting included a top political aide, Bruce Lindsey, and a battery of attorneys on the public payroll, including White House Counsel Bernard Nussbaum and two of his assistants.

The committee reasonably wants to know about government matters that may have been discussed, such as the handling of the investigation by the Treasury Department and the Resolution Trust Company into Madison Guaranty. A court will decide whether notes taken at the meeting and a White House memo about the session can be deemed personal legal papers. That will take an expansive interpretation in Mr. Clinton's behalf.

To be sure, citizen Bill Clinton is entitled to litigate all he wants and to claim whatever privacy the courts will give him. But

President Clinton, the politician and national leader, cannot expect the public to be reassured by mysteriously mobile files and promises of openness that disappear behind the lawyer-client veil.

Mr. D'AMATO. Mr. President, last Friday our committee voted out this resolution, asking that the full Senate authorize the Senate legal counsel to go to court to enforce the subpoena served on William Kennedy, former associate counsel to the President. The subpoena seeks the notes that Mr. Kennedy took at the Whitewater defense meeting, and which was attended by others, on November 5, 1993, with other White House officials and President and Mrs. Clinton's personal attorneys, a meeting that took place at the Clintons' personal attorney's office.

The President has repeatedly claimed that he would not assert privilege with regard to Whitewater matters. He has promised to cooperate fully with our committee investigation. But over the past weeks, President Clinton has chosen to resist our committee's investigation by preventing Mr. Kennedy from turning over his notes. Our committee must obtain Mr. Kennedy's notes in order to fulfill our obligation to the Senate and to the American people.

I could go on and on. I, indeed, will raise other matters. I will say that what we are attempting to do is to find the truth about the failure of an Arkansas savings and loan called Madison Guaranty that cost the American people $65 million. We want to find the truth about what happened to documents in Vincent Foster's office following his death, and why White House officials prevented law enforcement officials from seeing those documents; the truth about the activities of Hillary Clinton's law firm, the Rose Law Firm, in connection with their representation of Madison; the truth about White House efforts to obtain confidential law enforcement information about Madison and Whitewater and what they did with that information; the truth—not what Mr. Lindsey has said to us, that he gathered it so he could answer newspaper inquiries. But getting to the truth about these matters has proved to be rather difficult. And these notes, we believe, are relevant and will answer some of the questions and will lead us to other areas.

President Clinton's refusal to deal openly with our committee's investigations comes at a time when damaging facts have begun to mount and mount. These are facts that we have had to uncover on a daily basis, dragging out, dredging out, fighting for the information. So, again, to come before the American people and say we provided 50,000 pages of documentation means little, when the critical, crucial matters—which may be 8 pages, 10 pages, 2 pages of notes, telephone calls, logs that are missing, missing files—that is the key.

Vincent Foster was deeply concerned about Whitewater. That he was concerned about Whitewater can be attested to by his notes in which he said, ''Whitewater, can of worms you should not open.'' Vincent Foster had files about Madison that Webster Hubbell transferred to the Clintons' personal attorneys. Their phone records and White House entry and exit logs indicate that the President, that the First Lady, her chief of staff, Maggie Williams, and the First Lady's confidant, Susan Thomases, were deeply involved in the decision to prevent law enforcement officials from searching Vince Foster's office.

Let me again say, phone records indicate and the White House entry and exit logs indicate that the First Lady, the chief of staff, Maggie Williams, and the First Lady's confidant, Susan Thomases, were deeply involved.

That the First Lady was concerned about allowing law enforcement officers unfettered access to the documents in Mr. Foster's office; that a Secret Service officer saw Mrs. Clinton's chief of staff, Maggie Williams, carry files from Foster's office on the night of his death; that Hillary Clinton had not been forthcoming about the amount of work she did for Madison while a partner at the Rose Law Firm.

We have also learned that the critical billing records have disappeared, which raises the question: What was in the files Maggie Williams was carrying from Vince Foster's office? What did they contain? Are they the billing records? Where have the billing records gone to?

That former White House Counsel, Lloyd Cutler, misled the Banking Committee when he claimed, in the summer of 1994, that the Office of Government Ethics had exonerated the White House colleagues for their handling of confidential RTC information and that high White House officials sought to obtain confidential information from the Small Business Administration and in the Small Business Administration office in Little Rock about David Hale, a former Arkansas judge, who contended that the then Governor Clinton forced him to make an improper $300,000 loan to the Governor's Whitewater partner, Susan McDougal; that there was a deliberate effort to obstruct the RTC's criminal investigation of Madison and Whitewater; the U.S. attorney in Little Rock remained on the Madison case over the warnings of senior Justice Department officials in Washington and declined the first RTC referring.

Mr. President, our committee has uncovered these and other patterns, patterns of people who cannot remember where they were or what they were doing or who they were doing it with. We have a constant attempt at a diversion of information and the American people and the committee have a right to the facts.

Mr. President, let me say it is the intent of the committee to go forward. It is the intent of the committee to see to it that the subpoenas are enforced. It is the intent of the committee to bring this matter to a head.

I would say, even after a vote we stand ready to accept this information as we had outlined, going back to November. We had detailed that, I believe in writing, November 27. What we want is the facts. What we want is the information that the President has promised us.

I yield the floor.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Mr. President, I am going to take a few minutes to discuss the legal issue because I think it is very important in terms of the Senate reaching a decision whether to go to court with respect to obtaining these notes. The fact of the matter is the White House has said that these notes will be available. The White House, in order to make the notes available, is seeking certain assurances that it will not have a general, broad waiver of the attorney-client relationship. Our committee has indicated that the conditions the White House is seeking are reasonable ones and our committee is prepared to agree to them.

The White House concern, then, is with respect to other investigative bodies. For example, the independent counsel and the House of Representatives.

As I understand it, I am told that the White House has reached an understanding with the independent counsel that I presume parallels what our committee is prepared to do regarding the turning over of the notes as not being a waiver. So we are very close to having a resolution of this matter.

The problem now becomes, will the House of Representatives treat it—are they unwilling, in effect, to say this is not a general waiver?

Let me discuss briefly why this is important. The White House has made a number of proposals to try to resolve this matter. I disagree with the chairman, in terms of the chronology he set out with respect to efforts, back and forth, and who was being uncooperative. I think, frankly, the committee staff, on occasions, was not seeking a resolution of this matter and was moving in the direction of provoking a confrontation and a crisis, constitutional confrontation.

The special committee has agreed that the production of the notes of Mr. Kennedy, taken at this November 5, 1993, meeting—on which there are strong assertions of attorney-client privilege—but our committee has agreed that the production of those notes shall not act as a general waiver of the attorney-client privilege.

The only remaining hurdle then to getting those notes is agreement by the independent counsel and the House. I understand the independent counsel now has worked out an understanding with the White House.

I believe that the concerns about a general waiver of the attorney-client privilege are meritorious, and that the

Senate should make additional efforts to accommodate them before sending this matter to the Federal court. It always should be borne in mind that when the executive and legislative branches fail to resolve a dispute between them and instead submit their disagreements to the courts for resolution, significant power is then placed in the judicial branch to write rules that will govern the relationship between the elected branches. In other words, we have a chance here to work this out in a way that we get the notes, the White House concern about a general waiver of a privilege is accommodated, and there is no need to go to court running the risk, I would suggest to some Senators, of an adverse precedent. And I will make reference to that shortly.

Since a mutually acceptable resolution of this matter is at hand, if we can just reach out and grasp it, I strongly urge the Senate not to precipitate unnecessary litigation by passing this resolution. The argument is made, well, there is a time factor. If you go to court on this matter, there certainly will be a time factor. I mean you are caught in a situation here, the choice as it were, between achieving a resolution which would make the notes immediately available to us and going through an extended court proceeding which would take an extended period of time even under the most expedited procedures.

Let me first simply state that a number of legal scholars have examined this meeting that was held on the 5th of November of 1993, a meeting between the private lawyers the President was engaging and the governmental lawyers who had been handling various aspects of these matters for the President. The meeting was to brief the new private counsel hired by the Clintons. Several legal scholars have examined that meeting and have concluded that a valid claim of privilege has been asserted.

For example, University of Pennsylvania law professor Geoffrey Hazard, a specialist in legal ethics and the attorney-client privilege, provided a legal view that the communications between White House lawyers and the President's private lawyers are protected by the attorney-client privilege.

Other legal experts have concurred with that view. New York University law school professor Stephen Gillers stated, and I quote—this was in the paper:

> The oddity here is that Clinton is in both sets of clients, in one way with his presidential hat on and in one way as a private individual. The lawyers who represent the President have information that the lawyer who represents the Clintons legitimately needs, and that is the common interest. It is true that Government lawyers cannot handle the private matters of Government officials. However, perhaps uniquely for the President, private and public are not distinct categories. So while the principle is clear, the application is going to be nearly impossible.

And there are other legal experts who have said that there is a privilege that applies here.

Efforts have been made over the last few weeks to try to resolve this matter in a way that the committee would get the information it was seeking, and the White House would get assurances that it was not broadly and generally waiving the lawyer-client privilege—not only with respect to this particular meeting but with respect to all other meetings that touched on this subject matter. That is what the law may well provide. And that is one of the things, of course, that seems to me is a legitimate concern on the part of counsel for the President.

There is an original proposal for Mr. Kendall, the President's private lawyer, that would allow for questioning of people at that meeting in terms of what they knew when they went in and what they did after they came out. But I will not get into the questioning about the meeting itself. I thought that was an effort to try to accommodate, and to give the committee the chance to gain information, and, yet, not intrude upon the lawyer-client privilege. The majority projected that proposal, and the White House went back and sort of obviously reconsidered and came forward with a new proposal that embraced providing the notes to the committee.

Mr. KENNEDY, it needs to be pointed out here, is sort of a stakeholder. He happens to have these notes. He is not providing them in response to the committee's subpoena because he is instructed that he has to observe the lawyer-client privilege and, therefore, cannot provide this information. The canon of lawyer ethics is that you have to abide by the lawyer-client privilege. So he in effect says, ''Well, I have these notes. This is what I have been told and this is what I am doing.'' The White House and Mr. Kendall, the President's lawyer who was brought in to handle the private side of this matter, have in effect said that those notes ought not to be provided until they can get assurances with respect to the lawyer-client privilege.

Let me just make a point that I think legitimate privilege issues have been raised. I think it is clear that an attorney-client privilege does apply here. It is one of the oldest of privileges for confidential communications known to the law. I mean, if anyone stops and thinks about it, it is obvious why you have it. People then say, ''Well, if you have nothing to hide, why do you not tell everything?'' Of course, the logic of that assertion is that there would be no lawyer-client privilege. The logic of that assertion is that there would be no lawyer-client privilege, and in this instance, the White House says we are prepared to give the notes. We are prepared to provide the notes. We just want assurances that providing the notes will not be seen as a general waiver of the lawyer-client privilege.

So that in other fora, and in other matters, it will be sort of, well, in fact here you waive the lawyer-client privilege.

So they are trying to be forthcoming. They are trying to meet the demands of the committee for this information, and at the same time not completely eliminate the lawyer-client privilege. And the committee in the conditions it is prepared to accept—our committee, this committee—has moved to address that problem. The question then is will others who may undertake an investigation be prepared to do the same? As I understand it, the independent counsel is prepared to do so as well.

So it now really is a question of whether the House, the relevant committees in the House of Representatives, are prepared to do the same. Will they in effect make the same undertaking our committee is prepared to take? I might point out it does not lose them any position. I mean I have read this letter from Chairman LEACH that Chairman D'AMATO provided me. I am not quite sure that it is understood that they will not lose any of the positions they now have. The notes will become available. But it is understood that the notes do not constitute a waiver of a privilege. And the question then becomes why will not that be acceptable? What is the difficulty with that? I mean we obviously asked the same question amongst ourselves and reached a conclusion that those conditions were reasonable. There were some others that the White House dropped by the wayside. But we are now back to these conditions as was mentioned in the committee hearing, the two or three which the committee had been prepared to accept.

Let me just talk briefly about the general waiver issue.

The concern here is that the production of these notes could constitute a general waiver of the attorney-client privilege, and it would be a waiver that would apply to all communications relating to the subject matter of the meeting. In other words, you could then turn to other meetings, other discussions between the President and his lawyers and say, oh, no, the privilege has been waived with respect to those meetings.

It is this far-reaching aspect of the law of attorney-client privilege, the subject matter waiver, that creates the difficulty the special committee is facing here. Production of the notes without these understandings could be construed as a waiver of the privilege as to all communications on this subject matter. Potentially such a waiver would encompass all communications between the President and his lawyers at any time up to the present that pertain to the subject matter of this meeting.

Obviously, that is very far-reaching. The committee itself recognized that. Our committee recognized that. And our committee in effect said, no, that is not what we want to do. We do not

want to intrude in that manner into the attorney-client privilege, and therefore we are willing to agree to the condition that it would not be used, the argument would not be used that this constituted a general waiver.

This is a complex issue, no question about it, and it seems to me that taking it to the courts instead of resolving it, especially when it appears we are very close to resolution of the matter—that must be understood. We have a situation now in which the White House says we are willing to make the notes available. Our committee has said we will accept them on certain conditions which constitute an accommodation between the legislative and the executive branch. The independent counsel apparently has taken the same view. And the question becomes, will the House of Representatives join in, so you do not end up having a whipsaw action in which notes are provided in good faith and on certain understandings and then another investigative body says, oh, no, we are going to treat that as a general waiver and we are going to proceed on that basis, after this committee has said it would not treat it as a general waiver and after apparently the independent counsel has taken the same position.

In my view, this dispute has escalated needlessly. The White House has offered to provide the Kennedy notes to the committee, provide the Government lawyers for testimony, and in my view, rather than proceeding to the court at this time, the Senate should make a further effort to obtain this information in a manner that protects against an unintended general waiver of the attorney-client privilege.

It seems to me there is a constructive role that the committee can play in trying to accomplish that. We are not very far away from it, in my view, and it comports I think with the advice and counsel that has generally been provided historically with respect to these potential confrontations between the Congress and the Executive.

First of all, let me note that Congress historically has respected the attorney-client privilege. Indeed, Congress first acknowledged the confidentiality of attorney-client discussions back in the middle of the last century. In the middle of this century, the Senate considered a rule that would have expressly recognized testimonial privileges that traditionally are protected in litigation. The Senate thought of adopting a rule. It ultimately decided that a rule was unnecessary and stated:

> With few exceptions, it has been committee practice to observe the testimonial privileges of witnesses with respect to communications between clergyman and parishioner, doctor and patient, lawyer and client, and husband and wife.

As recently as 1990, Senate majority leader Mitchell stated that:

> As a matter of actual experience, Senate committees have customarily honored the attorney-client privilege where it has been validly asserted.

That has been true even in highly charged political investigations with respect to respecting the attorney-client privilege. For instance, during Iran-Contra, Gen. Secord and Col. North successfully asserted the attorney-client privilege. During the proceedings against Judge HASTINGS, the impeachment trial committee considered his claim of attorney-client privilege and ruled that testimony would not be received in evidence.

The Senate's most recent experience with the attorney-client privilege arose in the disciplinary proceedings against Senator Packwood. Prior to the controversy over Senator Packwood's diaries—prior to that—the Select Committee on Ethics considered Senator Packwood's assertion that certain documents other than the diaries were covered by the attorney-client or work product privileges. That was the assertion he made, that he was covered by these privileges.

To resolve that claim, the Ethics Committee appointed a former jurist—interestingly enough, it was Ken Starr—as a hearing examiner to make recommendations to the committee and accepted his recommendation that the privilege be sustained. With respect to the diaries, the committee agreed to protect Senator Packwood's privacy concerns by allowing him to mask over the information dealing with attorney-client privilege.

So there was no intrusion into the attorney-client privilege claim in that instance. The Senate respected that. This committee has extended protection of the attorney-client privilege to witnesses that have been before the committee.

During the hearing testimony of Thomas Castleton, Chairman D'AMATO confirmed that Castleton need not testify about conversations with his attorney. Similarly, he limited questioning of Randall Coleman by minority counsel regarding an interview his client, David Hale, granted to a reporter for the New York Times during which Coleman was present. That was Coleman, the client, and this reporter for the New York Times, and that was given this protection.

It seems to me that the President and Mrs. Clinton ought to have protection for the lawyer-client privilege consistent with past Senate practice.

Let me turn to why we need to avoid a needless constitutional confrontation by pursuing a negotiated resolution to this dispute.

Congressional attempts to inquire into privileged executive branch communications are rare and with good reason. In fact, the courts on occasion have refused to determine the dispute and have encouraged the two branches to settle the differences without further judicial involvement. In other words, when it comes to the court, it says you ought to settle it between yourselves and not involve the court in trying to address this matter. The U.S. Court of Appeals for the District of Columbia has long held that Presidential communications are presumptively privileged, and therefore it would take this matter to court. The committee is taking on a heavy burden.

Really what you have to do here is balance the interests. And how do you reconcile these differences? William French Smith, when he was the Attorney General, commented:

> The accommodation required is not simply an exchange of concessions or a test of political strength, it is an obligation of each branch to make a principled effort to acknowledge and, if possible, to meet the legitimate needs of the other branch.

The White House is trying to meet our needs by providing the notes. The White House now is taking the position, we will provide to the committee. The committee asserts that it wants these notes and needs these notes in order to carry forward its inquiry. The White House has said we will make these notes available. The White House says there is one problem with doing that, that making these notes available will then be seen as a general waiver of the lawyer-client privilege. And we do not want to be in that posture. We want to have assurances with respect that this does not constitute a waiver of the lawyer-client relationship.

This committee has recognized that argument because the committee has indicated that it is willing to accept the conditions that preclude that general waiver. The White House says well, that works with the committee, but there are other investigative places that could make the providing of the notes to the committee say this constitutes a general waiver, which is, I think, what the law provides. So they say, ''We want assurances with respect to these other bodies.''

One such body was the independent counsel. It was my own view that we should all get the independent counsel in, have a meeting, see if we cannot resolve this matter, and that the committee could have, you know, played a constructive role in doing that.

In any event, the White House went and engaged in its own direct discussions with the independent counsel and I am told they reached an understanding as of yesterday evening that will make the notes available, will provide the assurances against the general waiver of the lawyer-client relationship.

The question now becomes with respect to the House of Representatives, the White House apparently wrote to the Speaker about this matter. The two chairman of the relevant committees have indicated that they will not agree to the assurance, the very one this committee is prepared the make. I find it difficult to understand that. In other words, there is nothing in these conditions that causes them to lose anything in terms of their position. It does not deny them their position in any way with respect to future assertions that they might choose to make.

It makes the notes available, which people say needs to be done, and it does it in a way that the White House is not confronted with the very high risk that they have waived the lawyer-client relationship.

The Senate has recognized and respected this relationship for more than a century. A waiver of the privilege would deprive the President and Mrs. Clinton of the right to communicate in confidence with their counsel, a basic right afforded to all Americans. It is my view that the committee ought to turn its attention to resolving this matter in a way that the committee is prepared to do with respect to itself, that the independent counsel is prepared to do.

If that is accomplished, then the notes become available and you do not have any risk of the waiver of the principle. If you go to court, who knows how a court will rule. I think there is a very substantial chance that the court will rule against the Senate, and may in fact establish limits with respect to the Senate's congressional investigatory power that some of those pressing this matter will come to regret. You do not know what the court's outcome will be, but I think that is a very real possibility in this situation.

There has been a lot of movement on this issue. And it seems to me that the offer now that the White House has made in an effort to try to resolve it is very reasonable, is justified on the law and that it behooves us to try the accommodate to it and find a solution to this matter, a solution which would make this information available now as opposed to going to court.

I have difficulty understanding why this matter is at this point. I do not understand—I do not begin to understand why the House committees are taking this position because I think if they make the accommodation they have something to gain and nothing to lose. Now, if they simply want to provoke a confrontation, if that is the objective, that is a different story.

Mr. D'AMATO. Will my friend yield for an observation?

Mr. SARBANES. Certainly.

Mr. D'AMATO. On this point, and I just got this letter faxed to me. It says 12:18, but indeed it was 11:18. It is off an hour, this time clock, wherever this fax is operating from, which I have just sent over to my colleague.

Mr. SARBANES. Still on daylight saving time.

Mr. D'AMATO. And it comes from Chairman LEACH. And he did point out to me in a conversation—and it has just taken me a little time to assimilate this—obviously Chairman LEACH is very perplexed and disturbed and will not agree to a limitation of his rights even as it relates to the possible lawyer-client relationship because he feels that there is testimony in the record before him to his question that Mr. Nussbaum indicated these people at the meeting would not transfer information that should not have been transferred that would be inappropriate. I am summarizing it in order to save time.

And he goes down to—I will go to the last two paragraphs on page two. He says:

> To accede to the White House position that disclosure of the notes of the Nov. 5, 1993 meeting does not constitute a waiver of the President's attorney-client privilege, one must accept the proposition that a privilege attaches to this meeting in the first place. Given the presence of three Government lawyers at the meeting—and the indication that confidential law enforcement information may have been improperly disclosed to the President's private lawyer—that is a proposition that legal experts the committee has consulted on the subject cannot accept.

I think more importantly is his last paragraph that he points out to me:

> Given White House denials under oath to a House Committee that a transfer of information to parties outside the White House occurred, White House efforts to place limitations upon the House's ability to gather information necessary to fulfill its legitimate oversight function takes particular chutzpah.

I did not know that my colleague from Iowa would use a term that was frequently used in the Northeast, particularly in the Northeast. But—

> To date the White House has not consulted in any manner on this issue with the House Banking Committee.

I do not mean to be arguing the case on behalf of the House, but I think that what Congressman LEACH is saying quite clearly is they are very much concerned that under oath, the question he raised, as it relates to the possible transfer of documents that would be inappropriate to be transferred, such as criminal referrals to people outside of the White House, being assured by Mr. Nussbaum that it did not take place, and it appearing that maybe it did take place, he is not willing to concede or give up or limit the ability of the House to proceed as related to what took place to those documents.

That raises the question, a very interesting question, of whether or not even that relationship, which this Senator under most circumstances would say absolutely exists between a lawyer and his client may come into sharp contrast if information improperly received is passed to a private attorney, whether or not that private attorney may be examined as it relates to what he did, what he did not do, et cetera.

I believe that that is—this is again outside of my particular knowledge—but it is certainly contained within this letter. And I think that is one of the things that Mr. LEACH is concerned about.

Again, coming back to our particular proposition, I will say to my friend and colleague, I think that you and I and the committee, Democrats and Republicans, the minority and majority, have really gone as far as we possibly could. And I do not think this is a failure on the part of the committee. We did put forth fact that we would not say that this constituted a waiver. That is not the issue.

The issue is, when will you produce this documentation? As it relates to the independent counsel, we contacted him and the office of independent counsel has informed this committee that they cannot confirm or deny. So maybe they have worked it out. Obviously if the White House says that their objections have been met, I am not going to contest that. But they are not in a position to confirm or deny this statement, and an agreement has been reached.

But once again what we are hearing is the White House and the President saying one thing, and he is willing to make these documents available, that ''I will not hide behind privilege,'' and yet doing exactly that. And that is what this Senator has difficulty understanding. We have gone, this committee and this Senate, as far as we can. We have made every reasonable effort, and that is what brings us to this point.

I might note that in the five cases we have come forward as relates to the enforcement of subpoenas, in every one of those cases Congress has gone forward to enforce the subpoenas.

I thank my friend for yielding. We just did get this communique, and I shared it with you as soon as we received it. I wanted to bring it to your attention.

Mr. SARBANES. I am glad the Senator brought it to my attention, because it really does underscore the problem the White House is concerned about. In fact, Chairman LEACH is wrong in asserting they would have limitations placed upon their ability to gather information, just as that is not happening to us.

So the question then becomes, if you can get the notes which everyone asserts would provide an important piece of information, if you can get the notes and the condition you agree to for getting the notes is that the providing of the notes will not be treated as a general waiver of the lawyer-client privilege, which is a perfectly reasonable condition, it seems to me, why would you not enter into that arrangement? What is the problem? Why are the House committees taking this position? What game is afoot?

It is not a reasonable position to take in the circumstance. They lose nothing by accepting the notes and agreeing to the condition. In fact, they get ahead of where they are now, because the notes then become available. They cannot use the furnishing of the notes to claim the privilege was waived somewhere else, but if the notes are not provided, they cannot make that claim elsewhere, in any event. So it is not as though this sets them back. This, in fact, makes some progress in the inquiry.

I just do not understand this position, and it seems to me what this committee ought to be doing, frankly, is seeing if we cannot get the accommodation—well, I hear the statement from the independent counsel, and we

would have to see what the story is there, but I understood that could be resolved in the direct communications and then with respect to the House. Then you get the notes and you do not intrude on the lawyer-client privilege.

This administration has provided an enormous amount of material and access. Of course, people say a long time ago, you made a quote everything would be provided and there would be no invocation of privilege. I was asked about that by a newspaper person the other day. They said, ''Well, what about that?''

I said, ''Well, I'm sure when the President made that statement,'' and, in my view, he has delivered on it essentially, ''he never anticipated that we would get to the point where you would make a kind of a sweeping request that would carry the risk of totally wiping out his lawyer-client relationship.''

Obviously, when he made that statement, it seems to me, he was assuming that the request that would come would be within the area of reasonableness and that he would not confront one that carried with it the very real risk of no more lawyer-client relationship.

Obviously, when it reached that point, the President's lawyer said, ''Wait a minute, the logic of this is that you will not be able to have any confidentiality in your relationship with your lawyer.'' Of course, then some say, ''Well, he doesn't need any, he should just tell everything.'' ''What do you have to hide?''

But the logic of that argument is that you would never have any confidential relationship.

In fact, when the committee sent letters down to the White House requesting various materials, we recognized in the letters that we sent that some of the material sought would be subject to claims of privilege. In fact, we told the White House, if that were the case, to provide a log identifying the date, the author, the recipient and the subject matter and the basis for the privilege.

So this committee recognized at the outset that we could make interests for which a privilege could be asserted. We did not start from the premise that asserting a privilege was off bounds. We recognized it in the request that we made to the White House.

We have had a tremendous number of depositions, witnesses. None of that has been impeded or inhibited. We have had 32 days of hearings. We have had about 150 people who have been deposed. We have had, I think, some 80 people who have been actually heard in open hearings.

Virtually all of the differences have been resolved with respect to providing information. This one could be resolved. I want to underscore that point again: This one could be resolved.

We are at the point where the White House, in effect, has said we will accept the conditions the committee was willing to validate to provide the notes. They are trying to find the same assurances from the independent counsel and from the House of Representatives. That is not unreasonable. In fact, I think that is very sensible. And, therefore, the opportunity is here, in effect, to resolve this matter, without going to the courts, without, in effect, running this risk of trespassing on this very important relationship.

The chairman says, ''Well, you have turned over a lot of pages of documents,'' but that is not the relevant matter. Well, it is partly relevant. They have turned over an incredible amount of material. The committee has worked through it. It constitutes the basis for our questioning. The committee has now focused on the notes of this meeting and has said, ''We want the notes of those meetings.''

Originally, the position that was taken by Mr. Kendall was, ''Well, you can get that information in a different way without actually getting the notes.''

The majority said, ''Well, we don't accept that. We want the notes.'' The White House now has made a bona fide offer to provide the notes with certain assurances. This committee is prepared to give those assurances.

So if we were the only forum in which this issue might arise about the waiver, there would be no problem if the committee was the only forum. But the fact is there are other forums, and I think the White House reasonably says if we give the notes to this special committee, others will argue in those other forums that this constitutes a waiver; therefore, we want assurances there as well—the independent counsel and the House committees.

It is a perfectly reasonable request. My own view is, frankly, that the committee ought to take a more positive role and, in effect, bring these parties in and say, ''Let's resolve this matter without a constitutional confrontation.'' It is obvious that it can be done, and that is the course we ought to take. That, in effect, would provide the information far, far sooner than going to court will provide the information, and it will meet, I think, a very reasonable concern on the part of the White House that there is a general waiver of the lawyer-client privilege.

I would be surprised if there were Members of this body who thought there should be a general waiver of all lawyer-client relationships.

That is not the way the Senate has acted in the past. It is not the position we have taken. It was clearly not the position we took with respect to witnesses before our very committee. It was not the position the Senate took in the Packwood matter. I can run on back through history with respect to the decision to accord a certain respect to the lawyer-client relationship.

So, Mr. President, I think it is important that the Senate shift its attention to resolving this matter without a constitutional conflict. In my view, that is within reach, and we ought to be engaged in the process of trying to bring that about. That would be a solution that would provide the information, protect against the general waiver. That is something this committee is prepared to do. I understand it is something the independent counsel is prepared to do. If our colleagues in the House were prepared to do it, this confrontation would be set aside and this issue would be resolved.

I yield the floor.

Mr. BENNETT addressed the Chair.

The PRESIDING OFFICER (Mr. GREGG). The Senator from Utah is recognized.

Mr. BENNETT. Mr. President, I have listened with interest to my colleague from Maryland. We have discussed many of these issues in committee already, but I think it is necessary that we talk about them here on the floor.

Let me state to my colleague, and any other colleagues who may be listening, that I will stand absolutely with the Senator from Maryland to protect the attorney-client privilege in every circumstance, whether it regards the President of the United States, any citizen of the United States, or a convicted felon who is incarcerated by the United States. Wherever you wish to go where there is a legitimate attorney-client privilege, this Senator will stand to protect that privilege.

That is not an issue here. The President has the right to the attorney-client privilege. The President has the right to consult his attorneys on matters relating to his personal affairs, with the absolute assurance that no committee of Congress will ever intrude upon that consultation, and that no one will ever do anything that would weaken that right. It is one of the more fundamental rights established in American common law, and it must be protected.

I make that strong statement so that people will understand that the issue here is not the President's right to an attorney, or the President's right to protect the attorney-client privilege. The issue here is whether or not Government attorneys, paid for by the taxpayers, attending a meeting with the President's private attorneys, discussing matters that did not impact the Presidency, matters that took place prior to the President's election, have the same attorney-client privilege.

I am troubled by the number and type of people who attended the meeting with the President's private attorneys. This was a matter of discussing the President's private legal problems, so why was it necessary for four members of the White House staff to be present at this discussion, one of whom, though he has graduated from law school and has practiced as an attorney, at the time of his attendance, was not involved in legal matters for the White House. He was the head of White House personnel. He was not functioning in his capacity as an attorney when he attended that meeting.

I recall, Mr. President, when the office of counsel to the President was occupied by a single individual. It was not necessary for the President of the United States to have a substantial law firm operating under the cloak of ''counsel to the President,'' paid by the taxpayers, handling the President's personal affairs.

If I may, I will go all the way back to an era, which I realize has passed and cannot be reclaimed, to find an example and use it as an example of the kind of separation between personal affairs and private affairs that we once had. Harry Truman, as President of the United States, kept a roll of 3-cent stamps in his desk. Whenever he wrote a letter to his mother, which he did almost daily, he would reach into his desk and pull out the roll of 3-cent stamps, lick the stamp himself and put it on the envelope because, he said, ''Letters to my mother are not public business and, therefore, I will pay the postage myself.'' I realize we have come a long way from that point, and I would not expect the President of the United States to take the time now to say in his correspondence, ''Well, I must pay the postage on this one,'' or ''I will not pay the postage on that one.'' All of us in official life are so beset with correspondence that we never know whether the answer to a letter is a response from our official capacity or our private capacity. We pay for our Christmas cards ourselves, but much of the correspondence that comes out of our office could easily fall into either category.

But it is the mindset that there must be a separation between private affairs and public affairs that I want to appeal to. Here is a President who appoints—as it is his perfectly legitimate right to do—as deputy White House counsel a man whose principal activity in the White House turns out to be handling the Clintons' personal affairs—Vincent Foster, the focus of all of this investigation—who made himself the focus by virtue of his tragic suicide. He spent most of his time handling the Clintons' tax matters, the Clintons' investment matters, the Clintons' personal affairs. That came out in our hearings, as one of the support people on the White House staff—a secretary—was sufficiently concerned about the amount of time Mr. Foster was spending on nonpublic issues that she went to the general counsel for the President, Mr. Nussbaum, and asked the question, ''Is this a legitimate thing for Mr. Foster to be doing while being paid by the taxpayers?'' She made the comment that she, as a long-time employee of the White House counsel's office, had never seen anything like that being done in previous Presidencies. Specifically, she referenced the Bush Presidency. She was told that it is up to the counsel, Mr. Nussbaum, to make the decision as to what is appropriate and what is not in terms of time allocation, and as long as Mr. Nussbaum says that it is all right for Mr. Foster to spend the majority of his time handling the Clintons' personal affairs, that means it is all right for Mr. Foster to spend the majority of his time handling the Clintons' personal affairs.

I raise this because it is at the core of the controversy we find ourselves in. The Clintons obviously believe that anyone who works for the counsel to the President immediately becomes subject to the Clintons' private attorney-client privilege. If Mr. Foster was spending his time doing the Clintons' personal tax affairs, I think the case could be made that those tax matters could be covered by the attorney-client privilege. I certainly hope that my consultation with my attorney on tax matters is covered by the attorney-client privilege, if anybody should ever challenge me. And if I use Government lawyers to do that—I have not and will not—I guess the presumption in my mind would be that even though they are paid by the taxpayers, because they are doing this personal work for me, the work would be covered by the attorney-client privilege if they were private attorneys, so it should be covered by the attorney-client privilege now that they are public attorneys.

Let me digress, Mr. President, long enough to make the point that all of us in our official capacities do indeed have to call upon Government employees from time to time to advise us on private activities that impinge upon our public circumstance.

For example, when I was called upon to put my assets in a managed trust by virtue of my election as a Senator, I turned to the attorney in my Senate office who is familiar with Ethics Committee positions and requirements and asked him for advice as to how this should be done. I would expect those conversations to be covered by the attorney-client privilege as I discuss with him matters of some confidentiality.

The trust has been formed, the assets have been placed there, and documents have been filed with the Ethics Committee disclosing all of that. That is an example where I have a matter of personal concern that I discuss with an attorney who is on the payroll because he is in a position to advise me as to how my personal affairs impact in a public arena; in this case, the Senate Ethics Committee and the filings we are required to make here.

Accordingly, if the President were to turn to a member of the counsel to the President's office and say, ''I have a matter that stems from my personal affairs but that impacts on my public duties. I would like you to counsel me on those affairs, and I would expect that your counsel would fall within the attorney-client privilege.'' I have no argument with that.

The argument here is a meeting where the President's personal attorneys, concerned with actions that took place prior to his becoming President, concerned with allegations about impropriety if not illegality in those matters, holds a meeting with four employees of the White House to discuss those matters, and then says, ''Those employees of the White House are covered by attorney-client privilege, the same as we are.''

I find that a bit of a stretch, Mr. President. I made the point in the committee that there must be a dividing line somewhere between the President and Government employees. If you say, ''No, there is no such dividing line,'' you can then go to the point of saying any attorney who works for the executive branch anywhere in the executive branch can, by the President's direction, be covered by attorney-client privilege. Obviously, nobody would say that is common.

Where does the line move back to? Does the President have attorney-client privilege just with the counsel to the President? Does the President have personal attorney-client privilege with everyone in the counsel to the President's office no matter how large it gets? I am alarmed at how large it is getting. I remember when a President needed only one lawyer. If he wanted a legal opinion on something other than his own direct office matters he called the Attorney General. We are getting away from that now. We have a whole law firm under the title of counsel to the President. It seems to be supplanting the Attorney General in the role of advising the President on legal matters. That is another issue.

I think the line must be drawn as tightly to the President as possible. The President obviously thinks the line should be drawn as far away from him as possible. That is where the controversy for this Senator arises on this issue.

I am happy to exchange with my friend, the Senator from Maryland, in any colloquy or exchange, as long as I do not lose my right to the floor.

The PRESIDING OFFICER (Mr. SANTORUM). Without objection, it is so ordered.

Mr. SARBANES. First, let me say I think the Senator has made a very reasoned statement about the matter. Let me simply say when Mr. Roger Adams was before the committee, he is a career person in the Department of Justice, and he is sort of the one who gives advice on Government ethics to attorneys in the Department of Justice. That is his specialty. He was asked about Foster doing private law work for the President and Mrs. Clinton. He says, ''That doesn't surprise me a bit. There is a thin line between public business and private business and it does not offend me at all that the counsel or deputy counsel to the President does work on some personal things of the President and the First Lady.''

Just as the Senator indicated you might have a member of your staff, suppose you are doing your disclosure statement——

Mr. BENNETT. Precisely, and I have no problem with that. I do have a personal problem, whether it is legal or not, with the extent to which this

President seems to use this White House staff. I am entitled to that concern.

Mr. SARBANES. When Lloyd Cutler took over as White House counsel he raised that and apparently changes were made in the workings of the White House to more clearly draw the line between personal and public matters.

Mr. BENNETT. I have Lloyd Cutler's statement to that effect, if the Senator would like to hear it.

Mr. SARBANES. I think he was on point with that.

Let me go a step further on this question about this particular meeting and your observations about the extent of it which apparently causes you to question whether the lawyer-client privilege applies to it. Of course that, ultimately, if we press forward will be resolved by a court.

Let me just read this letter from Geoffrey Hazard, a very distinguished legal scholar, professor of law at the University of Pennsylvania, and he travels all over the country talking about these very problems. This was a letter to the White House counsel.

You have asked my opinion whether the communications in a meeting between lawyers on the White House staff, engaged in providing legal representation, and lawyers privately engaged by the President are protected by the attorney-client privilege. In my opinion, they are so protected.

The facts, in essence, are that a conference was held among lawyers on the White House staff, and lawyers who had been engaged to represent the President personally. The conference concerned certain transactions that occurred before the President assumed office but which had significance after he took office. The Governmental lawyers were representing the President ex officio. The other lawyers were retained by the President to provide private representation to him. On this basis, it is my opinion that the attorney-client privilege is not waived or lost.

A preliminary question is whether the attorney-client privilege may be asserted by the President, with respect to communications with White House lawyers, as against other departments and agencies of Government, particularly Congress and the Attorney General. There are no judicial decisions on this question of which I am aware. However, Presidents of both political parties have asserted that the privilege is thus effective.

This position is, in my opinion, correct, reasoning from such precedents as can be applied by analogy. Accordingly, in my opinion, the President can properly invoke attorney-client privilege concerning communications with White House lawyers.

Then he goes as he draws toward a close:

The principal question, then, is whether the privilege is lost when the communications were shared with lawyers who represent the President personally. One way to analyze a situation is simply to say that the ''President'' has two sets of lawyers, engaged in conferring with each other. On that basis there is no question that the privilege is effective. Many legal consultations for a client involve the presence of more than one lawyer.

Another way to analyze the situation is to consider that the ''President'' has two legal capacities, that is, the capacity ex officio—in his office as President—and the capacity as an individual. The concept that a single individual can have two distinct legal capacities or identities has existed in law for centuries. On this basis, there are two ''clients'', corresponding to the two legal capacities or identities.

The matters under discussion were of concern to the President in each capacity as client. In my opinion, the situation is, therefore, the same as if lawyers for two different clients were in conference about a matter that was of concern to both clients. In that situation, in my opinion the attorney-client privilege is not lost by either client.

The recognized rule is set forth in the Restatement of the Law Governing Lawyers, Section 126 (Tent. Draft No. 2, 1989), as follows:

If two or more clients represented by separate lawyers share a common interest in a matter, the communications of each separately represented client . . .

(1) Are privileged against a third person. . .

Inasmuch as the White House lawyers and the privately engaged lawyers were addressing a matter of common interest to the President in both legal capacities, the attorney-client privilege is not waived or lost as against third parties.

Now, as he said, it has never been adjudicated in a court. It could be decided differently. But this is a leading expert, and I think that is a very strong letter with respect to this matter.

Mr. BENNETT. I understand. I agree he is a leading expert. And it is a very strong letter.

I also note, however, as you have, that the matter has not been adjudicated in a court, and I think that may well argue strongly for us to proceed and allow the court to so adjudicate, because if we solve these matters by getting legal opinions on opposite sides and then reading the opinions to each other, we do not need courts. The courts exist to take the legal opinions on one side and the other and listen to them and make a decision. Many of those decisions, as the Senator well knows, are decided on a five-to-four vote, with strong letters from real experts ending up on the side of the four, sometimes, when it goes to the Supreme Court, and the strong letters from real experts ending up, sometimes, on the side of the five.

I have heard from distinguished commentators, lawyers of sufficient reputation to require us to pay attention to their views, that the President, in this case, has little or no grounds to stand on. The lawyer you have just quoted obviously disagrees with those opinions. I think that is why we have courts. It may be that this matter is important enough to be resolved once and for all, and the way to get it resolved is to proceed with the subpoena and let the court hear the matter.

Mr. SARBANES. Will the Senator yield?

Mr. BENNETT. Sure.

Mr. SARBANES. If the reason you are proceeding is in order to get the notes, and if the notes can be made available under what I regard as perfectly reasonable conditions, why should we provoke a court controversy on this matter?

Mr. BENNETT. If I may respond to the Senator, quoting comments he made in his opening statement, he said, ''There has been a lot of movement here.'' I agree with him, that there has been some movement here. But it is my observation that the movement has always come after the committee has decided to get tough, that the movement on this issue has come after the chairman said, ''We are going to issue a subpoena. We are going to go to the floor. We are going to demand Senate action.'' That is when the movement started to come.

So when the Senator from Maryland says if it is my purpose to get the notes, we can drop this and get the notes through other means, I say to the Senator, I would be willing to drop this as soon as the notes appear. I would be willing to vacate the order for a subpoena as soon as the notes appear, and not provoke this kind of confrontation. But until the notes come along, the pattern of behavior that I have seen on the committee says to me the best way to keep the movement going is to keep the pressure on.

Mr. SARBANES. If the Senator will yield?

Mr. BENNETT. I will be happy to yield.

Mr. SARBANES. First of all, it is my view, as I indicated also in my remarks, that the White House has been trying to reach an accommodation, and to some extent I think the confrontation was provoked by the committee.

But putting that to one side, we are now at the point where the proposition that we are wrestling with is pretty simple. That is, if the White House can get the same assurances from the independent counsel and the House that it has gotten from our committee with respect to this waiver question, they are prepared to provide the notes at once. We obviously thought that the conditions were reasonable in dealing with the White House on this matter, because we have agreed to them.

I think it is reasonable for the White House then to say that we ought not to be blind-sided or whipsawed on this thing, by other investigatory bodies, in other forums. And, therefore, we need to get from them the same or comparable assurances.

As I understand it—I do not have anything definitive—but I am told that this matter has been worked out with the independent counsel. Of course, assuming that is the case, that itself is a further major step forward. Then it just, apparently, now leaves us with a question of the House of Representatives.

Mr. BENNETT. If I could respond to the Senator? I agree. If, in fact, the independent counsel has made this

agreement, that is a significant step forward. He says that leaves only the House with which to deal. I am glad to know that, because the original condition that was sent to the committee had other agencies besides the independent counsel and the House. It had the RTC and the FDIC. I am assuming from the Senator's statement that means the White House has now dropped the demand that those people also have a veto power on whether or not the notes will be given to us?

Mr. SARBANES. Let me just read a letter from the White House counsel to Chairman D'AMATO. A copy was sent to me.

Mr. BENNETT. Absolutely.

Mr. SARBANES. It said:

DEAR CHAIRMAN D'AMATO, As I informed you yesterday we would, Counsel for the President have undertaken to secure non-waiver agreements from the various entities with an investigative interest in Whitewater-Madison matters. I requested an opportunity to meet with your staff to determine how we might work together to facilitate this process. Mr. Chertoff declined to meet.

Nonetheless, we have succeeded in reaching an understanding with the Independent Counsel that he will not argue that turning over the Kennedy notes waives the attorney-client privilege claimed by the President. With this agreement in hand, the only thing standing in the way of giving these notes to your committee is the unwillingness of Republican House Chairmen similarly to agree. As I am sure you are aware, two of the Committee Chairmen who have asserted jurisdiction over Whitewater matters in the House have rejected our request that the House also enter a non-waiver agreement with respect to disclosure of these notes and related testimony.

We have said all along that we are prepared to make the notes public; that all we need is an assurance that other investigative bodies will not use this as an excuse to deny the President the right to lawyer confidentiality that all Americans enjoy. The response of the House Committee Chairmen suggests our concern has been well-founded.

If your primary objective in pursuing this exercise is to obtain the notes, we need to work together to achieve that result. You earlier stated that you were willing to urge the Independent Counsel to go along with a non-waiver agreement. We ask that you do the same with your Republican colleagues in the House. Be assured, as soon as we secure an agreement from the House, we will give the notes to the Committee.

Mr. BENNETT. If my colleague will yield——

Mr. SARBANES. Let me read the last paragraph because it is important to keep this thing current.

Mr. Chertoff has informed me that the Committee will not acknowledge that a reasonable claim of privilege has been asserted with respect to confidential communications between the President's personal lawyer and White House officials acting as lawyers for the President. In view of the overwhelming support exercised by legal scholars and experts for the White House position on this subject, we are prepared simply to agree to disagree with the Committee on this point.

Accordingly, the only remaining obstacle to resolution of this matter is the House.

So that is where the matter now stands.

Mr. BENNETT. I thank the Senator for that. It represents, in this Senator's view, a significant movement on the part of the White House from the position taken less than a week ago, when the same Jane Sherburne gave us five conditions, two of which the majority on the committee had recommended to her, and the other three of which many members of the committee found to be unacceptable.

The two most objectionable of those conditions that she placed on giving up the notes, Nos. 4 and 5, in her correspondence of the 14th of December have been dropped from the letter that the Senator from Maryland just talked about. There is no relevance.

Mr. SARBANES. If the Senator will yield, 4 and 5 have been dropped; 4 is still relevant because that involves trying to get those assurances from another investigatory body.

Mr. BENNETT. No. 4 has been dropped as proposed. It has been replaced, in my view, with the request that the House now be involved because she wanted the House involved in No. 4 in the original letter. It represents movement. But I think the tenor of No. 4 has, in fact, been dropped and replaced by the acceptance on her part of taking just the House. We no longer have any references to the Resolution Trust Corporation and its successor and the Federal Deposit Insurance Corporation, which were for this Senator the two most difficult requirements that the White House had placed. So we have had movement. We have had significant movement. We have seen that movement come in response to the pressure created by the requirement for this subpoena.

The only other comment I would make with respect to Ms. Sherburne's letter of the 20th that the Senator from Maryland has just quoted is a personal disagreement with the opening clause in her sentence in paragraph 3 when she says, ''We have said all along that we are prepared to make the notes public.'' That does not coincide with this Senator's memory of the way the White House has proceeded. I will take the notes. I will read the notes as soon as they are provided. But I personally do not agree that the White House has indeed said all along that they are prepared to make the notes public. As I have said, I believe they have responded as the committee has gotten tough, and they are now saying things that in fact do not coincide with this Senator's memory of history.

If I can proceed then, Mr. President, if my colleague from Maryland is finished with the colloquy on this issue, I want to make some general points about why it is necessary for the committee to continue this somewhat militant stance that we have taken. I have been interested to watch this thing unfold as covered by the media.

If we were to go back to the beginning of the hearing, the reaction on the part of people covering this issue was that it was, frankly, a gigantic yawn and nothing for anybody to pay any attention to, nothing for anybody to get very excited about. I will not go back with a quotation trail beyond the month of December. But someone who wants to do a historical pattern of this could follow the pattern of media comments from the summertime on through the fall and then into December and see that people are beginning to pick up in their understanding, pick up in their concern about this. And, interestingly enough, it has come not just from the media that one would automatically assume would be favorable to the Republican point of view, but it has come from sources that have been traditionally, shall we say, somewhat skeptical of Republican positions.

In this month alone, Mr. President, starting toward the first of the month we have the following paper trail, if you will, from some of the leading papers in this country.

The New York Times on the 6th of December with the lead editorial entitled ''Whitewater Evasions, Cont.'' That is an interesting lead, an interesting title for an editorial. ''Whitewater Evasions, Cont.'' The Times has had previous editorials on Whitewater evasions, and they talk about it.

The final sentence of the editorial says, ''* * * what we are left with is a portrait that grows cloudier by the day of an administration that always dodges full disclosure.''

I suggest that comment by the New York Times corresponds with my response to the Senator from Maryland about the latest White House letter that says ''We have said all along that we are prepared to make the notes public.''

On the 7th of December, the next day, the Washington Post has an editorial entitled ''The White House Mess.'' This editorial states ''And the conflicting statements keep coming. That is the problem. Ms. Williams told the Senate Whitewater Committee this summer that she has given the Clintons' lawyer access to some 24 files found in Mr. Foster's office that contained personal matters of the Clintons. But she did not say that she was with him when he reviewed the files or that the review occurred in the first family's residence, as he now maintains.'' The editorial continues with the specifics of that particular comment.

How does this editorial conclude following on the editorial of the New York Times? ''Has the White House, through these twists, managed to throw suspicion over matters of little consequence, or is there something serious being covered up? The question is everywhere these days, in large part because of all of the improbable and implausible responses that have been made to inquiries so far. If the White House can clear them up, it surely should. Congress and the independent counsel are clearly not going to let things stand as they are now.''

That was the Washington Post on Pearl Harbor day, the 7th of December.

We go on to the 12th of December. The New York Times again, in an editorial entitled ''Traveling Whitewater Files,'' talks about the mysterious movement of files back and forth from closet to attorneys' offices and back to attorneys with occasional stops at basements of other attorneys. And it concludes with the point we have been discussing at such length here this morning, Mr. President. ''To be sure, citizen Bill Clinton is entitled to litigate all he wants and to claim whatever privacy the courts will give him. But President Clinton, the politician and national leader, cannot expect the public to be reassured by mysteriously mobile files and promises of openness that disappear behind the lawyer-client veil.''

Then we go on. We get closer to today. On the 14th of December, the Washington Post has an editorial entitled ''Now a Subpoena Controversy.'' It begins, ''In refusing to honor a Senate Whitewater Committee subpoena for notes taken by then-White House associate counsel William Kennedy during a November 5, 1993, meeting between White House officials and the Clintons' attorneys, the administration risks traveling down a familiar dead end.''

The Washington Post apparently is losing patience.

The final comment of this editorial is: ''The overriding interest is to get at the truth. If, however, a satisfactory solution cannot be reached, then the courts must decide. It shouldn't have to come to that.''

Apparently, the lawyers that advise the editorial writers for the Washington Post are not as easily convinced as the lawyers who have sent their opinions to the Senator from Maryland.

Just yesterday, in the New York Times again, the editorial is headed ''Averting a Constitutional Clash.'' And I quote: ''If Mr. Clinton relinquishes the documents, it would be a positive departure from the evasive tactics that have marked the Clintons' handling of questions about Whitewater since the 1992 campaign.''

''Mr. Clinton's assertion that the subpoenaed material is protected by lawyer-client privilege, and his quieter claim of executive privilege, are legally dubious and risk a damaging precedent.''

Now, I cannot argue that the New York Times is as distinguished a legal source as the lawyer who gave the opinion that the Senator from Maryland quoted, but again the lawyers who advise the editorial writers in the New York Times must have looked at this and they find it, to quote, ''Legally dubious, risking a damaging precedent.''

Mr. D'AMATO. Will my colleague yield——

Mr. BENNETT. Yes, I will be happy to yield.

Mr. D'AMATO. Just for an observation. Given the posture which the White House has taken and given the difficulty we have had in getting documents or information, given the dubious claim as it relates to lawyer-client privilege, is it not even harder for us, the committee, to accept this claim in light of the President's public statements as it relates to not raising privilege as a manner by which to protect documents? Does this impact on the Senator?

This is a statement that comes from the President on March 8, 1994, when he is appointing Lloyd Cutler, and the question was, was he going to invoke Executive privilege or a lawyer-client relationship privilege, and he ends up with, as his answer, he says, ''It's hard for me to imagine circumstances in which that would be an appropriate thing for me to do.''

Does this square then, Ms. Sherburne raising this, with what the President has said, that he would not—it is hard for him to imagine raising that privilege?

Mr. BENNETT. The Senator is correct to raise that quote in this context. It simply demonstrates that there are now some circumstances that the President was unable to imagine that long time ago because he has now asserted the privilege and we confront it.

Mr. D'AMATO. The meeting took place. He was aware of this meeting, obviously.

Mr. BENNETT. I believe he was aware of the meeting.

Mr. D'AMATO. This meeting took place well before, in November, and he made the statement in March. So he was aware of the meeting. It was not a circumstance that took place after the meeting.

Mr. BENNETT. I do not wish to be flippant about these matters because they are important matters, but I find myself saying the lapse of memory seems to fit a pattern that we have seen from other people in the White House.

Mr. D'AMATO. I thank my friend.

Mr. BENNETT. Mr. President, going back to the editorial in the New York Times of yesterday, after they made the statement that I have quoted about the legally dubious claims, they conclude that editorial with this comment cutting straight to the issue that we are talking about today on the floor:

> It should still be possible to make arrangements before tomorrow when the Senate is due to take up the matter. If not, the Senate has no choice but to vote to go to court to enforce the committee's subpoena.

Now, I have gone to the trouble of quoting all of these editorials leading up to this to indicate that this is not a sudden decision on the part of the editorial writers of the New York Times or I would assume the Washington Post, whose stream of editorials has gone the same way. As I say, I have not quoted from all of the papers that have been considered to be Republican friendly. I have quoted from papers that would normally be expected to take the President's side on this issue, and I find it somewhat interesting that the leader of those papers concludes its editorial by saying that the Senate has no choice but to vote to go to court and enforce the committee's subpoena. I see my friend from Connecticut rising.

Mr. DODD. Will my colleague yield?

Mr. BENNETT. Under the same procedure, Mr. President, that it is understood I would not lose my right to the floor, I will be happy to engage in whatever colloquy and debate my friend from Connecticut may desire.

Mr. DODD. I thank my colleague from Utah, Mr. President.

I just ask my colleague if he could enlighten us on whether the media have ever taken a position, on any matter where access to documents was the issue, they should not have total access to everything they want?

Going back over time, when the issue was attorney-client privilege or executive privilege, can the Senator cite to me an editorial from the New York Times or the Washington Post or any other paper where the paper did not think they ought to have unfettered access to documents? My point is that the media always want all of the documents. So we should expect to see the editorials my colleague cites.

Does my colleague disagree with me that, unlike legal scholars who look at constitutional issues, the press always takes the position that materials should be turned over?

Mr. BENNETT. I have not done that kind of research. I will go back and take a look at the past media circumstance. It is my impression that no one has called for breaching the attorney-client privilege for the President or anybody else; that the concern here has to do with whether or not that privilege extends to Government lawyers. I do not know of anybody in the media who would say that if the meeting was confined entirely to the President and the lawyers who had been hired by him and are being paid by him to represent him in his personal matters, the notes should be turned over. I have not had anybody say that to me. The issue is whether or not the presence of Government lawyers at the meeting so changed the nature of the meeting as to make it appropriate for the committee to ask for those notes.

So I understand the point that my friend from Connecticut is making, and I am sure that he is correct in terms of the institutional bias of the press. I would stop short of saying that it applies to violating all kinds of privilege. I think it applies to the narrow issue here as to what happens by virtue of the Government lawyers having been present.

Mr. DODD. Let me further inquire. I appreciate my colleague's generosity in allowing me to inquire. As I understand this particular point, we are down to basically one problem that stands in the way of an agreement—we need the House to agree that the release of the notes by the White House will not constitute a general waiver of the attorney-client privilege. That seems like a small problem to work

out. Clearly, we would all like to avoid having to take this matter to the courts. After all, precedent suggests they may just throw it back in our lap and say ''resolve it.'' So we spend 2 months on this issue and we are back where we started.

Mr. BENNETT. Two months, if we are lucky.

Mr. DODD. My colleague from Utah is probably correct. As I understand it, the independent counsel has already reached an agreement with the White House. It occurs to me that if the independent counsel, which has a prosecutorial function, can reach an agreement, than the congressional committees, whose fundamental function is legislative, should also be able to reach an agreement. If the independent counsel is satisfied with the agreement, then we should also be able to reach an agreement.

I am just curious as to why it would not be in our interest to take some time to have the conversation with our colleagues in the other body who are apparently resisting this to see if we can work out an agreement and put this issue behind us.

Is there some compelling reason why we ought not try to do that? If the independent counsel said this is totally unacceptable, I need the subpoenas, I can almost understand at that point why we would have to go through this process. But that is not the case. I ask my colleague if he would not agree with that.

(Mr. KYL assumed the chair.)

Mr. BENNETT. I say to my colleague that I would be happy to sit down with him if it were just the two of us and see if we could arrive at an agreement on that point. I have learned long since, even though I am a relatively new Member here, not to try to guess what the House will do under any circumstance.

Mr. DODD. My colleague has become very wise in the few years he has been here.

Mr. BENNETT. So I would not presume to try to give instructions to my colleagues in the House. But I think it is appropriate that we have these kinds of conversations. I think the Senator from Connecticut raises a very logical course of action that we should consider.

But I am not prepared to remove the pressure that the existence of this vote creates toward getting a solution because, as I said to the senior Senator from Maryland, in my opinion, the movement to which he refers would not have taken place if the committee had not taken the tough stance that it has taken.

The movement that we have seen in the White House position in just the last 24 hours, I believe, is attributable to the pending vote that we are going to take. If we take the vote and the White House and the House can come to some kind of a conclusion, then the subpoena called for in this vote is rendered mute and the matter is taken care of. But I would rather not remove the pressure that this vote represents until after the agreement is reached because I believe that the pressure of this vote has had a salutary effect in moving us toward that.

Mr. DODD. I thank my colleague for the time he has given.

Mr. BENNETT. Mr. President, I had not planned to go on this long.

Mr. SARBANES. Would the Senator yield on this point? I think there is a chance, once the vote is taken and the matter is sent to the court, then the people may say, ''Well, let the court decide it.'' And if the court decides it, first, you do not know what opinion you will get. That is, people make their reasonable calculations. Second, the timeframe then becomes quite extended.

It seems to me, given all the admonitions about trying to avoid a confrontation between the executive and the legislative branches, it would behoove us to do that because I think we are at a point right now where that opportunity is right here in front of us.

Mr. BENNETT. The Senator has raised a possibility which may indeed turn out to be the outcome. The matter becomes a matter of judgment as to which scenario you believe is the one that will play out, the one I have posited or the one that the Senator from Maryland has posited. And we will all have to vote and see which of those two scenarios is the one that comes about.

Mr. President, I had not planned to go on this long. I will be happy to yield again to my colleague from Connecticut, but I would like to wrap up.

Mr. DODD. I will seek recognition later in my own right. I thank my colleague.

Mr. BENNETT. I thank the Senator.

Mr. President, before I leave the quotations from the media, I must share with my colleagues one last editorial which comes from a source that is clearly not generally favorable to Republican positions, from a man whose writings I am not familiar with. However, I can catch the flavor of his position simply from reading this particular editorial. His name is James M. Klurfeld. He is the editorial page editor for Newsday. I will just quote a few comments, but I think it summarizes what is happening on this issue.

He says:

> I have to admit that I haven't paid that much attention to the Whitewater investigation. That is not only because it's too complicated to figure out, but also because an essential element of any real scandal is missing: the anticipation that the high and the mighty are about to be brought down. There has been, to be blunt, no scent of blood. Until now.

Mr. Klurfeld then goes on to recite some of the specifics of what has come up. He says:

> At the crux of the Whitewater investigation is whether they knowingly got money from the Whitewater-related projects and mixed it illegally with campaign money for a gubernatorial re-election campaign. That case has not been made. But there has always been a second Whitewater issue: whether the Clintons have abused the power of the White House to obstruct the investigation. And here things begin to look more troubling. There are credible allegations of files removed from the White House, of improper interference with the investigation of Foster's death and, most recently, the White House has refused to give memos of conversations involving the Whitewater matter to the Senate committee, first claiming lawyer-client privileges and now invoking the doctrine of executive privilege.

He continues later on in the article:

> What keeps nagging at me is that if my first assumption is true—that there is no criminal wrongdoing involved in the matter—then why is the White House and Hillary Clinton, in particular, so reluctant to come clean about everything? What does she have to hide? Why not just open all the files? After all, Hillary Clinton worked as an investigator on the Watergate matter. We all know she as smart and as sharp as any lawyer in Washington, let alone Little Rock. She knows, as we all know, Richard Nixon got caught up by the coverup of Watergate, not the burglary itself. It is inconceivable she would blunder into the same type of mistake. Unless, of course, there is something to hide. Then a cover-up makes sense, at least from her point of view.

Once again we find a pattern. Mr. President, I quote the summary sentence. Mr Klurfeld says:

> There are enough unanswered questions and White House evasions to justify further investigation. And I am ready to pay some attention to it.

The one area that has struck me as I have listened to this whole thing, that for some reason reached out and grabbed my attention, concerns the law firm records relating to Mrs. Clinton's billing for her services to Madison Guaranty. This first came up, Mr. President, when Mr. Hubbell was before our committee, and as part of the documents that were furnished to us at that time, we received a summary—recap, to use the word that is on the document—a recap of fees, from Madison Savings and Loan, and then typed below it says ''FINAL RECAP.'' And that is in all caps.

Understand, Mr. President, to put it in context, this is the legal work for which Mr. McDougal has said Mrs. Clinton was paid a retainer of $2,000 a month. Mr. McDougal's testimony was that then-Governor Bill Clinton came to him and said, ''We're having financial troubles. Can you get Hillary some money?'' And he said, ''I'll pay $2,000 a month to the Rose law firm. And she can handle the Madison affairs.''

To be clear in the RECORD, denial from the Clintons that this ever happened has been entered in the record. So it is Mr. McDougal's word against the Clintons' word on that particular issue. But nonetheless, in the documents that came from Mr. Hubbell, here is the final recap of fees paid.

When Mrs. Clinton was asked about these fees, she said—and I am quoting from her press conference—''The young bank officer did all the work. And the letter was sent, but because I was what you call the billing attorney—in other words, I had to send the bill to get the

payment made, my name was put on the bottom of the letter.''

The strong implication there, you see, is she did little or no work, she simply signed the letter because she was the billing partner, and the client did not want to pay a bill if it was from an associate.

In an interview with the Office of Inspector General at the FDIC on the same matter, we find this characterization: ''Mrs. Clinton indicated she did not consider herself to be the attorney of record for Rose's representation of Madison before the ASD and presumed it to be Rick Massey. She recalled Massey came to her and asked her to be the billing attorney, which was a normal practice when an associate was handling a matter.''

Then, Mr. President, in her affidavit on this matter that was given to the FDIC Office of Inspector General, she, being duly sworn, says, ''While I was the billing partner on this matter, the great bulk of the work was done by Mr. Richard Massey, who was then an associate at Rose and whose specialty was securities law.''

''I was not involved in the day-to-day work on the project. My knowledge of the events concerning this representation, as set forth in this Answer, has been largely derived from a review of the relevant documents, rather than my contemporaneous involvement in the representation since Mr. Massey primarily handled the matter.''

The reason this is important, Mr. President, is that Mrs. Clinton clearly had some relevant documents she reviewed in order to conclude that she was not involved in the day-to-day work on the Madison matter. She had no contemporaneous memory of it. She had to go back to the relevant documents.

Now we have what I consider to be two relevant documents, and the first one is the one that came before the committee, the recap of fees for Madison Guaranty Savings & Loan. I questioned Mr. Hubbell about this at some length, and Mr. Hubbell finally said, ''Senator, I apologize that I am unable to articulate to you exactly the way things are handled so that you can really understand what happened.''

I said, ''Mr. Hubbell, I'm sorry, I can't articulate to you my reaction to these numbers. I am not a lawyer. I have never made out a time sheet, but I have paid lots of legal bills. I think I can read a time sheet.'' And I went over this as I would if it were submitted to me, and I find the following, Mr. President.

In the total amounts covered by this final recap, the amount billed by Mr. Massey by name is $5,000, rounded. I have not added up the odd dollars and cents, but I have rounded it. Mr. Massey, over the period of this representation by the Rose law firm, billed around $5,000. Mrs. Clinton, in that same period, billed approximately $7,700. She says she reviewed relevant documents that refreshed her memory, but that she was nothing more than the billing partner and that the work was done by Mr. Massey. But from these billings, Madison Guaranty was billed in Mr. Massey's name for around $5,000. If Mrs. Clinton was just the billing partner who signed for him, all of the billing should be in her name and his name should not appear. But if he is billing in his own name, then why was it necessary for her to bill significantly more than he did, if he was the one doing all the work?

There is an interesting pattern here, Mr. President, because in the month of May, Mr. Massey billed $695, Mrs. Clinton, $840. Thus Mrs. Clinton billed more than Mr. Massey when the account was brought in.

Then very dramatically the pattern changes. In June, she only billed $60. I assume that is a half hour's worth of work. Mr. Massey, $186. In July, she billed $144, he billed 10 times that, $1,400, and so on. Mr. Massey, in November billed $552; Mrs. Clinton does not appear. In December, he billed over a thousand; she billed around $4,200.

Then it changes very dramatically and Mr. Massey disappears, as Mrs. Clinton starts billing heavy-hitter numbers to the point where at the bottom of the sheet, when you add it all up, Mr. Massey billed around $5,000. Mrs. Clinton has billed around $7,700.

The other contemporary document which we have been able to obtain, which presumably Mrs. Clinton had available to her as she refreshed her memory, was the document that came before the committee this week where Susan Thomases took notes on a conversation during the campaign with Web Hubbell. These notes are very revealing against the background I have just outlined.

This is what Susan Thomases testified Mr. Hubbell told her. She made it clear she did not know whether this was the truth or not; she was simply recording what she was told. To put it in context, Mr. President, her assignment on the campaign at the time this conversation took place was damage control over the Whitewater controversy.

Mr. DODD. Will my colleague yield on that point?

Mr. BENNETT. Surely.

Mr. DODD. I appreciate going into these matters. As I understand it, we are debating the issue of subpoenas. We are kind of revisiting what we went over in the committee. My colleague has a right to do it. I am not suggesting he does not. I would like to debate the issue of subpoenas—that is what draws us to the floor today—instead of rehashing billing questions. At some point, are we going to get to the issue of subpoenas?

Mr. BENNETT. I say to my colleague, I will get to it as quickly as I can. If I had not had the exchanges I had, I would have been through with this a long time ago.

Mr. DODD. I thank my colleague.

Mr. BENNETT. Having started, I want to finish the point, and I think it important all Members of the Senate find out about this because it goes to the heart of why we are having this conversation at all.

Here are the notes that Ms. Thomases took of her telephone conversation with Web Hubbell: ''Massey has relationship with Latham and Hillary Clinton had relationship with McDougal. Rick''—that is to say Massey—''will say he had relationship with Latham and had a lot to do with getting the client in.''

These are the notes of the damage control person. ''This is what we're going to say about how Madison Guaranty came to the Rose law firm: Rick will say he had relationship with Latham and had a lot to do with getting the client in. She did all the billing. Hillary Clinton had number of conferences with Latham, Massey, and McDougal on both transactions. She reviewed some documents. She had one telephone conversation in 4–85 beginning of the deal with Bev.''

Bev is the appropriate Arkansas State regulator handling these matters.

''Neither deal went through. Broker dealer was opposed by staff but approved by Bev under certain conditions which they never met.''

Now here is a crucial sentence for me: ''But for Massey, it would not have been there. Rose firm prohibited from filing examiner's report.'' And at the bottom: ''Hillary Clinton was billing partner and attended conferences. He''—I am assuming ''he'' is Massey—''he had a major role blank hours versus Hillary Clinton's blank hours.''

We are trying to fill in the blank, and the only document we have with which to fill in the blank goes contrary to these notes. That is, Mrs. Clinton's hours are greater than Mr. Massey's hours rather than less. But the interesting thing for me is the statement flat out: ''Rick will say he had relationship with Latham and had a lot to do with getting the client in.''

Later on: ''But for Massey, it would not have been there.''

The December 18 New York Times has the following comment:

> In her 1992 notes, Ms. Thomases records how top campaign officials discussed how to answer questions about Madison and the Rose firm.
>
> Her notes show that Mr. Hubbell told her that an associate in the firm, Richard Massey, ''will say he had a lot to do with getting client in.'' Mrs. Clinton has also said, in sworn testimony to regulators, that Mr. Massey brought in Madison as a client. But Mr. Massey, now a partner in the Rose firm, has told Federal investigators that he does not know how the firm came to represent Madison.

Well, Mr. President, I think the Senator from Connecticut makes an appropriate point, and we should not rehash everything that happened in the hearings. I will now step down. But I go through all of this to demonstrate my conviction that pressure from the committee has been essential to the forthcoming of documents. Whether the

pressure has been continued badgering by the majority staff or whether it has been formal subpoenas or threats of subpoenas, it has taken pressure every step of the way for us to get documents. And in every case, when we have come close to getting a resolution to an issue, we were told, ''Well, that document does not exist,'' or ''I do not remember.'' And we find the same circumstance here. After we discussed the conflicting evidence, Web Hubbell told me, ''The only way you are going to find out what really happened, Senator, is to get the original billing sheets.'' We now find that the original billing sheets do not exist.

Several Senators addressed the Chair.

The PRESIDING OFFICER (Mr. BROWN). The Senator from Alabama [Mr. SHELBY] is recognized.

Mr. DODD. Mr. President, point of order. This Senator was standing, and I have been here for some time to speak. Also, are we not going back and forth on either side of this matter?

The PRESIDING OFFICER. The Senator has made a point of order. It is my understanding that it is in the Chair's discretion to recognize the Senator from Alabama. I am advised that he has been here for 2 hours, which is a significantly longer period of time than the Senator from Connecticut.

The Senator from Alabama is recognized.

Mr. SHELBY. Mr. President, it is not surprising to me today that we are where we are today—forced to seek enforcement in the courts of a subpoena for documents from the White House.

It is no surprise to me, Mr. President, because the White House's refusal to release the notes sought under this resolution is part and parcel of this administration's consistent and continuous way of operating, its modus operandi, if you will, on how to cooperate with the special committee without really cooperating.

It goes something like this: ''Do not give up any information or documents unless you absolutely have to, and if forced to give them up, release it to the press first with your spin on it before giving it to the committee.''

Mr. President, throughout the committee's investigation, witnesses from the White House have come before the committee and, en masse, failed to recollect, remember, or to recall important meetings, conversations, and phone calls.

We have so much testimony on the record, reciting the lines, ''I cannot remember, I do not recall, I do not have a specific recollection,'' that you would begin to wonder whether amnesia is, in fact, contagious.

We had the dance of the seven veils from the White House witnesses, whom the committee was being forced to recall every time a new document or phone log previously unattainable mysteriously appeared in some way.

Interestingly, Mr. President, while White House officials were suffering under the debilitating loss of memory, or selective memory, career prosecutors and law enforcement personnel were able to remember phone calls, conversations, and meetings with great specificity.

Quite frankly, the testimony before the committee has come to be the tale of two stories. One story was told by the Clintons' political appointees and long-time business partners and friends, versus the story told by career professionals, civil servants, law enforcement personnel and, yes, investigators.

Mr. President, this wholesale memory loss, evasive answers, and claims of privilege against document production sounds strangely familiar, does it not?

Indeed, Mr. President, in the past couple of weeks I have noted what I believe is an increasing similarity between this White House and the Nixon White House. In my view, the committee's need to enforce the subpoena for the notes only reinforces the Nixonian comparison.

Last week, during the committee hearing on Whitewater, I compared some of the arguments that Mr. Clinton has made with the arguments that Mr. Nixon made in support of Executive privilege in 1973 and 1974. Now, some have suggested that this is purely a political exercise. But the fact is, Mr. President, that this is the first time that such a defense—that I am aware of—has been raised since the Nixon administration.

Furthermore, this same defense of privilege has been tried and tested in the courts, and it has failed. The comparison is, therefore, self-evident, Mr. President, and the exercise rather instructive, giving all of us an opportunity to examine the reasonableness of the White House's claim of attorney-client and possibly Executive privilege.

I would like to share some of the quotes with you. First, this is President Nixon's response to a question from a UPI reporter on March 15, 1973.

He said:

> Mr. Dean is counsel to the White House. He is also one who was counsel to a number of people on the White House staff. He has, in effect, what I would call a double privilege, the lawyer-client privilege relationship, as well as the Presidential privilege.

Those were the words of President Nixon. Compare those with the following words, which were sent up to the committee by the White House on December 12, 1995:

> The presence of White House lawyers at the meeting does not destroy the attorney-client privilege. On the contrary, because of the presence of White House lawyers, who themselves enjoy a privileged relationship with the President and who are his agents, was in furtherance of Mr. Kendall's and White House counsel's provision of effective legal advice to their mutual client, their presence reinforced, rather than contradicted, the meeting's privileged nature.

Think about that just a minute. Compare them in your own mind.

I will read President Nixon's address to the Nation announcing an answer to the House Judiciary Committee subpoena for additional Presidential tape recordings on April 29, 1974.

President Nixon said:

> Unless a President can protect the privacy of the advice he gets, he cannot get the advice he needs. This principle is recognized in the constitutional doctrine of executive privilege, which has been defended and maintained by every President since Washington and which has been recognized by the courts, whenever tested, as inherent in the Presidency.

Let us compare Nixon's statement to the White House brief on behalf of President Clinton to the committee, December 12, 1995:

> If notes of this type of meeting are accessible to a congressional investigating committee, then the White House counsel could never communicate, in confidence on behalf of the President, with the President's private counsel, even when the discussions in question are properly within the scope of the official duties of the governmental lawyers. Such a rule would deprive the White House counsel of the ability to advise the President and his White House staff most effectively regarding matters affecting the performance of their constitutional duties.

You be the judge. The words of Nixon and the words on behalf of President Clinton.

I will now share with you a statement President Nixon made to reporters' questions, the National Association of Broadcasters, on March 19, 1974:

> Now, I realize that many think, and I understand that, that this is simply a way of hiding information that they should be entitled to, but that isn't the real reason. The reason goes far deeper than that. In order to make decisions that a President must make, he must have free, uninhibited conversation with his advisers and others.

The words of President Nixon. Compare those with the words of the White House brief on behalf of President Clinton, December 12, 1995:

> The committee's action also implicates important governmental interests—namely, first, the ability of White House counsel to discuss in confidence with the President's private counsel matters of common interest that indisputably bear on both the proper performance of executive branch duties and the personal legal interests of the President, and second, the ability of White House counsel to provide effective legal advice to the President about matters within the scope of their duties, including the proper response of executive branch officials to inquiries and investigations arising out of the President's private legal interests.

Again, ''Private legal interests.'' Compare, again; you be the judge of the similarity.

Now, from the words of President Nixon in a letter responding to the House Judiciary Committee subpoenas requiring production of Presidential tape recordings and documents, June 10, 1974. What did he say?

> From the start of these proceedings, I have tried to cooperate as far as I reasonably could in order to avert a constitutional confrontation. But I am determined to do nothing which, by the precedents it set, would render the executive branch, henceforth and forevermore, subservient to the legislative branch, and would thereby destroy the constitutional balance. This is the key issue in

my insistence that the executive must remain the final arbiter of demands in its confidentiality, just as the legislative and judicial branches must remain the final arbiters of demand on their confidentiality.

The word of President Nixon.

Now, in the brief on behalf of President Clinton to the committee, December 12, 1995:

In a spirit of openness and with considerable expenditure of resources, the White House has produced thousands of pages of documents and made scores of White House officials available for testimony, foregoing assertion of applicable privileges. In view of this cooperation, the committee's attempt, after 18 months, to invade the relationship between the President and his private counsel smacks of an effort to force a claim of privilege by the President, who must assert that right to avoiding risking the loss, in all fora, of his confidential relationship with his lawyer.

Now, you compare it. You have seen the words and the comparison. I think they are relevant. This comparison, I believe, Mr. President, is self-evident and the exercise rather instructive.

I do not know whether the Clinton administration has anything to hide. But I do know this: The first administration to use these arguments certainly did have something to hide, and we know what happened there.

If the White House does not have anything to hide, and I hope they do not, if there is nothing of substance in these notes, nothing damaging in these notes as they claim, then they should comply with the subpoena and produce them to the committee without any reservations, without any conditions, because, Mr. President, if there is nothing damaging in these notes, it is incomprehensible to me why they would raise a defense clearly rejected over 20 years ago.

Mr. President, I also would ask unanimous consent that a letter from Mr. Hamilton, to the President, dated January 5, 1994 be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE WHITE HOUSE,
Washington, December 14, 1995.

Michael Chertoff,
Special Counsel.
Richard Ben-Veniste,
Minority Special Counsel, U.S. Senate, Special Committee to Investigate Whitewater Development Corporation and Related Matters, Dirksen Building, Washington, DC.

GENTLEMEN: Pursuant to the agreement described in my letter to Mr. Chertoff of December 13, 1995, I am enclosing copies of the January 5, 1994, letter from James Hamilton to the President (S 012511–S 012516).

Please feel free to call me if you have any questions.

Sincerely yours,

JANE C. SHERBURNE,
Special Counsel to the President.

SWIDLER & BERLIN,
Washington, DC, January 5, 1994.

The President,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: At Renaissance you asked for my ideas on management of the Whitewater and trooper matters. This responds.

As a preface let me mention that, because of my representation of the Foster family, I've had numerous calls from the media about these issues and thus know the views that some of them hold. Let me also say that, so far, the White House generally has handled these matters well.

Here are my ideas, some of which are obvious and have been implemented, but perhaps bear repeating.

1. Despite the falsity of the allegations, these remain treacherous matters, *L.A. Times* reporters basically believe the troopers (although this confidence should now be shaken). *Washington Post* reporters consider the Lyons report a ''joke'' because of its incompleteness, and suspect a cover-up when it is cited in response to current inquiries. Reporters are intrigued by Vince's inexplicable death, and thus continue to search for Whitewater connections.

2. Investigations, like other significant matters, must be carefully managed. One person in the White House (Bruce, I assume) should be assigned responsibility for coordinating information gathering, responses to official inquiries and public statements about these matters. *This cannot be treated as an incidental assignment.*

3. The White House should say as little and produce as few documents as possible to the press. Statements and documents likely will be incomplete or inclusive, and could just fuel the fires.

4. The White House should ensure that what statements it does make are consistent and coordinated. Erroneous or conflicting statements could be disastrous; the Nixon White House brought huge trouble upon itself by issuing inaccurate, inconsistent statements about Watergate. *The Washington Times* in particular has been dissecting current White House communications.

5. Responses to official inquiries—both written and oral—must be carefully made. Even oral misstatements could result in investigations and sanctions. Moreover, the Department of Justice, FBI and Park Police all leak unconscionably (and already have as to these matters), and some officials obviously are inclined to attack the White House's handling of the inquiries.

6. The White House should not forget that attorney-client and executive privileges are legitimate doctrines in proper contexts. While the on-going release of Whitewater documents to Justice seems appropriate, Bernie initially acted properly in protecting the contents of Vince's files.

7. If politically possible, Janet Reno should stick to her guns in not appointing an independent counsel for Whitewater. An independent counsel—who might pursue his or her self-aggrandizement rather than the truth—is a recipe for trouble.

8. The White House must let Justice do its investigation without interference. Any hint of attempts at interdiction or manipulation would raise the spectre of Watergate.

9. The White House also should avoid any future contacts with subjects of the investigation that might provoke cover-up allegations.

10. You should continue to demonstrate that you are engaged fully in the business of running the government and not distracted by these side shows. If the press senses concern, its efforts redouble.

11. Because you will continue to receive reporter questions about these matters, I respectfully suggest that you always be prepared personally with a response to the issues of the day. I expect that ''no further comment'' often will suffice.

I hope the above views are at least somewhat useful. Kristina and I hugely enjoyed the opportunity to visit and recreate with you and Hillary in Hilton Head. The football game was stupendous fun; the ''scrum play'' was the call of the day. I only wish the rest of America knew you as the Renaissance family does and had heard your moving remarks on Saturday night.

Best regards,

JAMES HAMILTON.

Mr. SHELBY. Mr. President, just to paraphrase some of it, not all of it, in this advice to the President by Mr. Hamilton, the attorney:

The White House should say as little and produce as few documents as possible to the press. Statements and documents likely will be incomplete or inconclusive, and could just fuel the fire.

Listen to this advice to the President:

The White House should ensure that what statements it does make are consistent and coordinated. Erroneous or conflicting statements could be disastrous; the Nixon White House brought huge trouble upon itself by issuing inaccurate, inconsistent statements about Watergate. The Washington Times in particular has dissecting current White House communications.

Then, item No. 6 on the advice to the President:

The White House should not forget that attorney-client and executive privileges are legitimate doctrines in proper contexts. While the ongoing release of Whitewater documents to Justice seems appropriate, Bernie initially acted properly in protecting the contents of Vince's files.

Item 11:

Because you will continue to receive reporter questions about these matters, I respectfully suggest that you always be prepared personally with a response to the issues of the day. I expect that ''no further comment'' often will suffice.

Now, Mr. President, item No. 2, back on the first page of the letter which I have introduced, to the President by Mr. Hamilton says:

Investigations, like other significant matters, must be carefully managed. One person in the White House, (Bruce I assume) should be assigned responsibility for coordinating information gathering, responses to official inquiries and public statements about these matters. This cannot be treated as an incidental assignment.

However, Mr. President, rather than heeding the advice, this advice which has, in fact, led to the same mistakes that the Nixon White House made, I think the White House should be forthcoming on these subpoenas. If they have nothing to hide, and I hope they do not, why go through the exercise? Why go through this?

What are we interested in, Mr. President, as this committee? We are looking at the truth of what went on. Did they have information that they should not have had? Where did they get this information? I believe the President would serve himself well and the American people if he produced these documents with no conditions, without reservation.

Mr. DODD. Mr. President, let me begin by addressing some of the issues that have been raised by my colleague from Alabama.

Clearly, anytime there is a confrontation between the executive

branch and the legislative branch, which oftentimes happens, people are going to make similar arguments. We should not be surprised if some statements sound similar.

But comparing Watergate and Whitewater is just ridiculous in the mind of this Senator—there is just no comparison whatsoever. When someone tries to make that sort of comparison they are just creating some sort of sideshow.

The comparison is spurious. First, no one ever sought to invade the attorney-client privilege of President Nixon. President Nixon raised the issue of executive privilege. The appropriate committees during that period respected the attorney-client privilege when it was raised. Now, Executive privilege was another matter, but attorney-client privilege, even in Watergate, was never breached.

Second, when the executive privilege claims of President Nixon were overcome, it was only through a grand jury subpoena issued by Special Prosecutor Cox. As I mentioned earlier, the independent counsel in our case has reached an agreement with the White House concerning the notes that are at issue in the subpoena. So the situation is completely different.

Also, during the Watergate matter, the Senate's attempt to get the material obtained by Special Prosecutor Cox was rebuffed by the courts.

Finally, the Special Prosecutor's efforts to get materials in the Watergate matter occurred in the context of overwhelming evidence of criminal conduct—obstruction, misuse of the CIA, FBI, and IRS, the payment of hush money, clemency for burglars. By contrast, in the Whitewater matter, after months of hearings by the special committee, there is no evidence of impropriety much less illegality by the Clinton administration.

In fact, my colleagues may have seen buried away in the newspaper articles in the last couple of days, that Pillsbury Madison & Sutro, an independent law firm, just completed a report examining whether there should be any additional civil proceedings against the Clintons with regard to Madison Guaranty Savings & Loan and the Whitewater Development Corp. The report was commissioned by the RTC and it took 2 years and $4 million for it to be completed. Mr. President, this report, which I am going to ask unanimous consent be printed in this RECORD—it was made a part of our committee record the other day—goes into great detail, and concludes that no further action should be taken against the Clintons. It exonerates the Clintons.

So, when we compare the obstruction of justice and the great criminality that a special prosecutor saw in Watergate and compare that with this particular case, it just goes to confirm what many people, unfortunately, are feeling here. This is becoming a political sideshow, and it should not.

Every Member has the right to raise whatever issues they want, but I do not think it does us any good as an institution, nor the committee, when we start drawing comparisons that have no relevancy whatsoever when it comes to the particular matter that we are being asked to address.

Mr. President, let me also address one of the comments that was made by my friend and colleague from Utah, Senator BENNETT. He said, in effect, that we need this kind of pressure to get evidence from the witnesses.

Again, I just remind my colleagues here, this year alone we have had 32 days of hearings and meetings on this matter. Last year we had extensive hearings on this matter. We have spent now a total, if you take congressional committees and you take the independent counsel's activities, over the last year or so, we have spent in excess of $25 million. Let me repeat that, the taxpayers have paid over $25 million on these investigations. To date, there has been no substantial evidence of any illegalities or unethical behavior. That has been the conclusion of witness after witness.

The White House has submitted to the committee over 15,000 pages of official records without a single court order being necessary, not one. The President's personal attorney has produced 28,000 pages of documents. Every witness that has appeared, last year and this year, has come at the urging of the White House. So when my colleague from Utah says without the pressure of having a subpoena filed, or the Senate as a body taking an action—that is not borne out by the facts.

We can disagree with what witnesses say. We may have problems, as the chairman has had, with the testimony of a number of witnesses. I respect that. I am not suggesting that we have all agreed with all the testimony. But there is a significant difference between what has happened in this matter, and what has happened in the past. We are all familiar with previous administrations that fought congressional committees tooth and nail. That has not been the case here.

It is very important, I think, for our colleagues and the public at large to understand that significant difference. This White House has been extremely forthcoming, extremely forthcoming when it comes to documents and when it comes to witnesses appearing before our committee. So the notion that it would be impossible to get any kind of negotiated result on the issue now before us, based on what has happened previous to this, is not borne out by the facts.

To the contrary, we have been able to reach agreement on virtually every other issue that has come before us without having to go to the courts. So, for those of us who stand here today and urge this body and urge our colleagues here to try a little bit harder to resolve this issue without getting to the courts, that is based on the fact that we have not had to do that yet. We have completed an awful lot of work without any problems. The committee has taken over 150 depositions and over 70 witnesses have appeared before the committee. As the chairman pointed out the other day in committee, we are basically through with the first two phases, other than some witnesses that need to be brought back. But we are prepared now to move to the last phase.

So here we have gone through all of this without having to resort to the courts. We are down to a legitimate issue here. The White House is not being obstructionist, this is not Watergate. As our colleague from Maryland pointed out, there are significant legal scholars who believe that the executive branch assertion of attorney-client privilege here has merit. In fact, they go to some length and cite the case law and so forth that upholds their point. I know there are others who have a different point of view. I am not arguing there are others who have a different point of view.

To the chairman's credit and to his counsel's credit, there has been an effort here now to narrow this and get it done. As I said to my colleague from Utah a few minutes ago, the independent counsel now has agreed to conditions with the White House. He is satisfied with an agreement that will protect the White House from a waiver of the attorney-client privilege. Our chairman in our committee would be satisfied with a similar agreement. The one missing link in all of this is our colleagues in the other body, to get them to agree to what the independent counsel has agreed to, what the chairman has agreed to, and what the White House has agreed to; that is, to turn over these documents with the understanding there has not been a general waiver of the attorney-client privilege.

Clearly, it is not unreasonable for the White House to pursue these agreements. As has been pointed out by legal experts, there have been a number of cases where, if you waive the privilege in one instance, it is seen as subject matter waiver. So there is a legitimate interest in trying to make sure that, in order to comply with committee's request to look at the notes from this meeting, that the President has not waived his attorney-client privilege. Understandably, the President wants to avoid a fishing expedition that goes off in a number of directions. All of my colleagues can appreciate that concern.

We have to remember that we are setting a precedent with our actions today. And that precedent could also affect Members of this body. Like the President, we are public officials who have both public and private roles. Some of my colleagues on one side of the issue today may change their minds when, in the future, someone argues that they have waived their attorney-client privilege in similar circumstances. We can all understand the

President's argument, that he needed both his private attorneys and counsel for the Presidency in that meeting in order to properly address all of the issues that might arise. As has been noted, legal scholar after legal scholar after legal scholar has said that is an appropriate invocation of that privilege.

So it seems to me we ought to try to avoid going to court on this issue. That is why we make the strong case we do here. It is not because someone is trying to hide documents. If that were the case, then I suspect the executive branch might rely on the advice of legal experts and say let us just take it to court. But they have said they will turn over these documents, but do not ask us to waive, on the entire subject matter, the attorney-client privilege. We do not want to do that. And I do not blame them for not wanting to do that. I do not think anyone would, given the dangers associated with that particular approach.

So, I am still hopeful that, given the history of this White House, when you go back and look over the last 2 years, the dozens and dozens of witnesses, the thousands of pages of documents, an agreement can be worked out. I hope future administrations will look at how this administration has responded, again, never requiring the committee to go to court, never requiring the committee to drag witnesses in, never requiring the committee to fight for documents. So, with all due respect to my colleague from Utah, because of that cooperation, there is an opportunity to resolve this issue short of a vote by the full Senate. And the fact that the independent counsel has reached an agreement, the fact that the committee could settle for a similar agreement, suggests that we ought to try to meet with our colleagues in the House and resolve this matter quickly and efficiently. Lets get the notes and move on so this committee can complete its work.

My hope would be in these coming hours here that will be the result. Some may say, well, if we can vote on it here, we will put more pressure on them. There will then be the vote of the U.S. Senate, issuing subpoenas where attorney-client privilege has been invoked. I think that is a wrong approach to take on this matter.

I point out, Mr. President, I have referred to the Pillsbury Madison & Sutro report on the RTC issues. Again, I urge my colleagues to obtain a copy of this report and to review this report and to examine the results.

The Wall Street Journal reported the results the other day.

Let me quote, if I can, the Wall Street Journal story on this report:

> President Clinton and Hillary Rodham Clinton had little knowledge and no control over the Whitewater project in which they invested, and they weren't aware that any funds that went to Whitewater may have been taken from Madison. . . . Accordingly, there is no basis to sue them.

Mr. President, let me emphasize that: ''There is no basis to sue the President or the First Lady.'' That is not Democrats and Republicans sitting there squabbling about this; that is an independent investigation, which took 2 years, without the glare of hearings and cameras, and on the central issue they say that no further civil proceedings should take place. That is a very important piece conclusion.

So, again, I hope in the next few hours that our colleagues would adhere to the advice of our colleague from Maryland and others, and take care of this matter without going to the courts. Let us avoid a dangerous precedent.

I know what is happening here. Some of my colleagues are thinking, ''Well, you know, we have them on the ropes now. What are you trying to hide?''

Obviously, that is just politics. We all know that. You can cause some damage with just the photograph of witnesses huddling with lawyers. That is titillating. That is exciting stuff. ''Now they are bleeding. Now we have them.''

That is what we really have going on here now. We ought to try to avoid that. Our role, fundamentally, is legislative. We conduct investigations, of course, but that is primarily to help develop legislation. And it seems to me that, where you have a White House that is cooperating, you ought to avoid a confrontation with the executive branch.

After all, it is not clear what the third branch of government, the judiciary, will do. In similar cases, the courts have thrown the matter right back to us and have said, ''Look, you people sort this out your own way. We are not going to make the decision for you.'' So we may end up, after months of squabbling, in no better position than we are in today.

So I urge my colleagues, let us adopt a resolution, if you will, or language which would urge us all to stay at that table and resolve this over the next few days. I believe we can. As I say, we are down to one last entity here. We are down to our colleagues in the other body being satisfied that this is an acceptable agreement. The independent counsel agrees, we agree, and the White House agrees. This is not a time to provoke an unwarranted and unwise confrontation that would create problems for us in the years to come.

Mr. FAIRCLOTH addressed the Chair.

Mr. D'AMATO. Mr. President, I intend to yield to my friend and colleague who has been on the floor for quite a while. If I might, without prejudicing anybody, ask my colleague——

The PRESIDING OFFICER. The Senator from North Carolina.

Mr. D'AMATO. Might I ask my colleague to give me a minute?

Mr. FAIRCLOTH. Sure.

Mr. D'AMATO. First of all, I want to thank the Senator from Connecticut for an observation that he has made. It is not easy when there are politically charged times and atmosphere. Admittedly, this is. We would be disingenuous at the least to say that it was not. So I admit that. Therefore, it takes even more courage for the Senator from Connecticut to recognize that the chairman—and, more importantly, that the committee—has really made every effort to avoid unnecessary confrontations, repeatedly, as it is related to documents that may have been in the possession of White House counsel, documents that may have been in the possession of Mr. Foster's counsel.

We have set up procedures whereby we could have review of notes, where counsel will agree, or where the ranking member and the chairman would agree, so that we would not put matters into the public domain that had no relationship to this committee. So we have made these extraordinary efforts, and indeed it was on the basis of the two suggestions that the White House did concede.

We indicated that we were quite content to get the notes. That still remains our position. We are not looking to invade any legitimate claim or to speak to the President's counsel. At least we are not as it relates to what he did, et cetera, or what advice he may have given to the President. We are not asking that. That is an important acknowledgment. I want to thank my colleague.

Unfortunately, we can only speak for ourselves and we can do on the committee—Democrats and Republicans. Unfortunately, that is not the connotation that has come from those many associated with the White House or from the White House spokesperson. If you could read their statements, there is a failure to acknowledge the great and extraordinary lengths that over a period of time—not just with respect to this matter—we have engaged in, and certainly I would submit that we made every effort not to move it, but it has finally reached a point where I determined that it was necessary for us if we are going to resolve this and move to this point. So I make that observation.

Mr. DODD. If my colleague will yield, I appreciate that, and I realize that we will at times have disagreements.

I also made the observation—I ask my chairman and friend —that this administration has been extremely forthcoming with witnesses and documents the committee has wanted.

Would not my colleague agree that is the case?

Mr. D'AMATO. There I have to say we have a disagreement, and we just do. I am not suggesting that there have not been many areas as it relates to documents that have come forth.

Mr. DODD. But we have not had to go to court.

Mr. D'AMATO. That is right. I think the reason that is because we have made an extraordinary effort—''we'' being the committee—on a bipartisan basis both before, when my friend and colleague and the Democrats were in

the majority, and since we have carried that further.

So I say the committee has made the extraordinary effort in a bipartisan effort to interact and to do our job appropriately. But as it relates to the ''forthcoming,'' some of this may not be fair, but I will make an observation as it relates to witnesses and production of documents. Without going through the whole thing, I believe that it has not been an exercise of the same faith and bipartisanship that we have operated with in the committee.

Mr. DODD. I appreciate my colleague's comments. I would just say, if you use other examples——

Mr. D'AMATO. There are always examples. Look, some people can do these things better in terms of an appearance, and I do not want to, ourselves, to degenerate into who did more and less and who withheld and who did not in terms of all of the administrations that the Congress has dealt with. But I would say it is not the quantity of records that are produced but it is the quality. It is the fact that information that is important and goes to the essence of this investigation has to be produced in a timely manner without there being bits and pieces. Of course, some of that comes from witnesses themselves who may not be fair. And it would not be fair, for example, as it relates to Mrs. Thomases' testimony and also the production of records as a kind of a trickling. But the same could be said in other areas as it relates to the White House. But again we could disagree on that. And I respect my colleague's right to share a difference of opinion on it.

Mr. FAIRCLOTH addressed the Chair.

The PRESIDING OFFICER. The Senator from North Carolina is recognized.

Mr. FAIRCLOTH. I rise in strong support of Senate Resolution 199. Mr. President, Whitewater has come to mean many things to many people, but it is worth discussing how we arrived at this point. It is worth reviewing how Whitewater became a national story because it tells us something about the failure of the savings and loan industry and it also tells us a lot about the ethics of Bill and Hillary Clinton.

In February 1989, Madison Guaranty Savings & Loan failed. The failed cost to the American taxpayers was $60 million. This may not seem like a lot of money in Washington, but beyond the beltway it is still considered a sizable amount. In fact, the entire savings and loan crisis cost the American taxpayers $150 billion, which is truly a staggering amount. Is it any wonder that the Banking Committee has every right—in fact, a duty—to review the cause of the crisis? While Madison was a small institution, its failure ranks as one of the worst. It failed to the taxpayers; over 50 percent of its assets were lost. The taxpayers had to pick them up. Fifty percent of its assets were totally worthless.

Jim McDougal took over Madison from 1982 to 1986. In 4 short years, the so-called assets grew from $6 to $123 million. During McDougal's tenure at Madison, loans to insiders increased from $500,000 to $17 million—insider loans from $500,000 to $17 million. Madison, frankly, was typical of many savings and loans in Arkansas. During his tenure as Governor of Arkansas, 80 percent of Arkansas State chartered thrifts failed, costing U.S. taxpayers $3 billion. That is $3 billion in tax money because the savings and loan system in Arkansas was run as a cozy operation without any worthwhile regulatory oversight. The Whitewater debacle was among one of the those risky real estate ventures that caused Madison to fail. We know from the hearings held by the House Banking Committee that at least $80,000 in insured deposits was taken from Madison Guaranty and siphoned off to Whitewater—$80,000 of it was lost on Whitewater.

Furthermore, the claim that the Clintons lost money is just absolutely false. They never had their money at risk. It was a sweetheart deal for the new Governor and much like the commodities trade in which Hillary earned $100,000 because she read the Wall Street Journal. Madison was a high flier. It has been called a personal piggy bank for the politically elite in Arkansas. I called it a calabash of intrigue.

I do not often agree with the editorial pages of the New York Times, but they somewhat paraphrased me and they said it was ''a stew of evasion and memory lapses.'' I think they are absolutely correct.

Mr. President, the central issue in Whitewater has been whether Madison received favorable treatment from the Arkansas savings and loan regulators because of Jim McDougal's close ties to Bill Clinton. Essential to the question is this: Did the losses to the taxpayers increase because Jim McDougal hired the Rose law firm to press his case with the State regulators which Bill Clinton had appointed?

The answers are becoming more clear. In just the last few days, on Monday, evidence was revealed that Mrs. Clinton was a lead attorney on matters relating to Madison at the Rose law firm. Further, and most significant, Mrs. Clinton may have made false statements—a Federal crime—to the RTC about who was responsible for bringing Madison's business to the Rose law firm. Mrs. Clinton contended in writing to the RTC that Richard Massey, then a first-year associate at the firm, was responsible for bringing Madison's business to the Rose law firm.

This is incredible, to say the least. It is unbelievable to think that a first-year associate would be responsible for bringing Madison as a client to the Rose law firm given the Clintons' close ties to Jim McDougal who ran Madison.

The unbelievable nature of this contrived story may be borne out in the notes of one of Mrs. Clinton's best friends, Susan Thomases. Miss Thomases was the point person for press stories regarding Whitewater in the 1992 campaign. She was in charge of attempting to distance Hillary Clinton from the failure of Madison. But her own notes read that ''Mr. Massey will say he had a lot to do with getting the client in.'' Her own notes show that the Clintons intended Mr. Massey to fabricate a story about who got Madison as a client for the Rose firm. This is a direct contradiction to what Mrs. Clinton had told Federal investigators. Mr. Massey has told the FDIC that he had no idea how the Rose law firm was hired by Madison.

Mr. President, this is significant for two reasons. First, it demonstrates the Clintons were involved in obtaining lenient treatment from the regulators for Jim McDougal and his savings and loan that was deep in financial trouble. Why? Because at the same time their friend Mr. McDougal was covering the Clintons' loan payments for Whitewater. McDougal was covering the Clintons' loan payments for Whitewater.

Can you imagine two Yale-educated attorneys that have no idea how their indebtedness was being paid? They knew full well. In exchange, the Governor's wife was going to exert her influence with the State regulators to help her friend and business partner, Mr. McDougal. It was quid pro quo, pure and simple, and there is not any other way to describe it.

Second, Mr. President, it is becoming more apparent that Hillary Clinton may have lied to Federal investigators. Her story that it was Mr. Massey who obtained Madison as a client is belied by the notes of her best friend.

Mr. President, in my opinion, the Whitewater hearings and the entire episode have been so full of so many half-truths, misleading statements and selective memories that it is only a matter of time before someone is guilty or charged with perjury. I think we have reached that point for some already.

It is clear that the Clintons tried to distance themselves from Madison and Whitewater. Had the American public been given the real picture in the wake of the savings and loan crisis, I think they would have reacted very differently to the insider quid pro quo way of doing business in Arkansas, particularly since the American taxpayers paid for the lax regulations.

Mr. President, Whitewater extends even farther than Madison Guaranty. It involves a small business investment corporation called Capital Management Services. This company was run by a man named David Hale. It, too, served as a personal bank for the well-to-do in Arkansas.

Its purpose was to make loans to the disadvantaged—the disadvantaged. But that turned out to be the ruling class in Arkansas. Regrettably, the American taxpayers paid over $3 million for the failure of Capital Management.

Mr. President, it is fact that Capital Management made a $300,000 loan to Whitewater. Now, you remember, it was supposed to be making loans to the disadvantaged. But Whitewater got $300,000. We have strong evidence that Bill Clinton asked that this loan be made. I think time will tell that David Hale is telling the truth when he said that Bill Clinton pressured him to make the loan to help benefit Whitewater. Here again the American taxpayers have paid to subsidize Bill Clinton's failed real estate venture.

That is essentially what these hearings are about: The loss of taxpayers' money in Madison, Whitewater, and Capital Management. Mr. President, these instances may have remained Arkansas history and been laid to rest but for three defining events. First, the tragic death of Vince Foster, close friend and deputy counsel to the President; second, criminal referrals made to the RTC regarding Madison and Whitewater; and, finally, the closing of Capital Management, David Hale's small business company.

Mr. President, Vince Foster's death on July 20, 1993, and the handling of his papers on the night of his death have raised the most questions with the committee. We know for a fact the First Lady spoke with Maggie Williams before Maggie Williams went to the White House and Vince Foster's office. We know they spoke later that evening when Maggie Williams returned to her home from Vince Foster's office and called the First Lady. We also know that, at nearly 1 a.m., Maggie Williams and Susan Thomases spoke. We have the sworn testimony of uniformed Secret Service officer Henry O'Neil, who saw Maggie Williams remove documents from Vince Foster's office on the night of his death.

Officer O'Neil is an 18-year career man with the Secret Service. All of this is fact. Within the last few weeks we have gathered more information that I think gives credence to the notion that files were indeed removed on the night of Mr. Foster's death.

First, two files relating to the Madison Guaranty were sent back to the Rose law firm by David Kendall. Yet, files were never part of the box that Maggie Williams said she took from Foster's office 2 days after his death.

These documents were reviewed and cataloged by Bob Barnett, the Clintons' other lawyer. The two Madison files never appeared in any list compiled by Mr. Barnett. In other words, they had been removed from the boxes before they were given to Mr. Barnett.

I think the files were removed by Maggie Williams and given directly to Hillary Clinton. We have further evidence that Maggie Williams visited the First Lady on the Sunday following Mr. Foster's death. Previously, Maggie Williams has said she did not see the First Lady until later.

We have Secret Service logs that show Maggie Williams spent time on the second floor residence of the White House on Sunday immediately after Mrs. Clinton returned from the Foster funeral. I believe that at this time Maggie Williams personally delivered to Mrs. Clinton whatever material she removed from Mr. Foster's office that night.

What evidence do we have to suggest that Madison may have been a problem or a concern for the White House or Vince Foster on July 20, 1993? This was the same day that a search warrant was authorized for the office of David Hale in Little Rock. That warrant sought information about David Hale's $300,000 loan to Whitewater via Madison Marketing and Susan McDougal.

Again, our Whitewater hearings have uncovered that the White House was aware of the Hale investigation from the very beginning.

We have testimony from a career Small Business Administration official. The SBA briefed Mack McLarty in May 1993 about the SBA investigation of David Hale. I have no doubt that within the legal circles of Arkansas, the impending search of David Hale's office was a well-known fact within the community. If so, this information surely would have reached Vince Foster.

We know Mr. Foster thought Whitewater was a ''can of worms,'' his own words, even before he became deputy White House counsel. We also know that the failure of Madison and the first criminal referrals were known to the White House.

In March 1993, Roger Altman, the Deputy Secretary of the Treasury, was informed of this referral naming the Clintons. Do we know that he relayed this information to the White House? We know that about the same time Altman received his briefings, two articles were faxed to Bernie Nussbaum's office—one sent so hurriedly that its cover sheet was handwritten by Josh Steiner.

The next day the same fax was sent again, this time by Mr. Altman's secretary. It is clear he wanted the White House to know more about Whitewater.

All of these matters were known to the White House. Madison, criminal referrals, David Hale, all were on the White House's mind. Maybe not the public's at the time, but certainly the White House was tracking events closely. Whether this was a defining moment for Mr. Foster, we do not know. But the circumstantial evidence that has been brought out in these hearings is very strong.

Mr. President, now we begin to focus on the significance of the November 5 meeting that is the subject of this subpoena. The RTC issued more criminal referrals on October 8. However, the White House had prior knowledge of these referrals. This is laid out carefully in the report on this resolution.

Jean Hanson, Treasury's general counsel, imparted nonpublic information to Bernie Nussbaum. Nussbaum then directed this information to Bruce Lindsey. He told the President. The existence of these criminal referrals became null after an October 31, 1993, article in the Washington Post. Six days later the White House gathered their legal team in the private office of David Kendall.

There, I believe, the White House imparted the information they had received in a Government capacity and used it to aid them in the private legal problems of Bill and Hillary Clinton. In other words, I believe they took information that they received because of their governmental capacity and used it for their personal and private legal problems. Further, this private meeting may have led to an effort to gather more nonpublic information about the Clintons' problem.

Just days later Neil Eggleston, one of the White House attorneys present in the meeting, sought inside information from the SBA about David Hale. Finally, some of what may have been discussed at this meeting, I suspect, could be perceived as an obstruction of justice if the White House did anything that smacks of interfering with the RTC or the SBA investigation.

Mr. President, this is what is so important about the November 5 meeting. It is really the missing link for the White House hearings. We know from our hearings in 1994 that the White House received privileged information about the RTC's investigation of Madison. We do not know what the White House did with the information. The November 5 meeting may finally reveal what they did.

It is inexcusable that taxpayers paid for these attorneys to essentially function as a private legal team for the Clintons. It is inexcusable that they would engage in this activity on Government-paid time. And it is inexcusable that they have the audacity to claim privilege as if they were private attorneys.

Mr. President, in short, the real importance of this meeting is whether the heads-up the White House received from Treasury and others turned out to be a leg-up for the Clinton legal defense team. That would be wrong, unethical, and possibly illegal. This Congress needs to find out which.

Finally, Mr. President, let me turn to another subject I have raised often in committee. Time and time again the subject of the First Lady's involvement in all of these issues has surfaced over and over for—soon it will be 3 years.

She handled Madison work at the Rose law firm. She was active in Whitewater. She spoke with Maggie Williams twice on the night of Mr. Foster's death, before and after Ms. Williams went to the White House. She spoke with Susan Thomases who, in turn, spoke with Bernie Nussbaum about calling off the official search of Foster's office. Her chief of staff, Maggie Williams, was briefed about the statute of limitations issue, which may have affected her personally and the Rose law firm.

Over and over, the subject keeps coming back to Hillary Clinton. I have

called for her to appear before the committee. My friend and colleague from New York has been patient, very patient—sometimes I feel too patient—in getting the answers. I do not think we can wait any longer, and I do not think we should wait any longer. We have to have the First Lady as a witness and under oath so we can get the real answers to our questions. This is the key to finding out what happened, and I do not know any reason why she should not be willing to come and clarify the problems we have run into. Without her testimony, no investigation will be complete.

Mr. President, let me conclude by saying that Whitewater is a very serious concern. We have a witness in Arkansas, David Hale, that has made a serious allegation against the President: That he pressured David Hale to make a phony $300,000 loan to Whitewater.

The President has denied this, but with Mr. Hale's cooperation, the independent counsel's investigation has now resulted in nine guilty pleas and five more indictments, including Jim McDougal, Bill Clinton's business partner, and the current Governor of Arkansas, Jim Guy Tucker, friend of the President and friend to David Hale.

Mr. President, the tide of Whitewater is rising. The scandal is getting closer to the President and the First Lady. It is getting closer to the White House by the day and spelling trouble for this President. What we can do here today may be the beginning of the end of the Clinton White House. These notes may begin to unravel the scandal and the truth finally may at last be told.

I yield the floor.

The PRESIDING OFFICER (Ms. SNOWE). The Senator from California.

Mrs. BOXER. Madam President, I am very pleased I was on the floor to hear my colleague from North Carolina because he has a theory about Whitewater, and he has every right to hold any theory he chooses. I respect his right to his opinion, but I am here to tell my colleagues that not only are his views not backed up by the facts, but they are contradicted by the facts. I want to take just one example.

He says the Clintons were actively involved in Whitewater. He said the Clintons were actively involved. Jay Stephens of Pillsbury Madison & Sutro just got paid by the RTC $3.6 million, and what does their report say? It was referred to by Senator DODD. I am quoting:

> There is no basis to charge the Clintons with any kind of primary liability for fraud or intentional misconduct. This investigation has revealed no evidence to support such claims, nor would the record support any claim of secondary or derivative liability for the possible misdeeds of others.

It goes on:

> It is recommended that no further resources be expended on the Whitewater part of this investigation.

So here you have a Senator who comes to the floor and says that the Clintons were involved when a Republican, a former U.S. attorney—and you can remember there were some people in the Clinton White House who were very concerned that perhaps he would not be objective—finds that, in fact, they have no involvement.

So to come on this floor and stick to a theory that has been disproven I do not think does this Senate any good, especially since we are trying to work with the facts.

Madam President, $3.6 million was expended to find out that the Clintons did not have anything to do with it, and we have a Senator say, ''It's getting worse. The tide is rising. We have to have Mrs. Clinton come before the committee,'' and all the rest.

I suppose there is nothing that I can say to my friend that will dissuade him from his theory and, therefore, I am not going to try to do that, except to continue to rebut what he says with the facts.

He has talked about obstruction of justice. He has talked about perjury, and I urge him to be very careful with the kind of things he says on the Senate floor, because I have to say it is very hurtful to reputations of people to throw those kinds of charges around here.

I speak today as a member of the committee who voted all along to continue this Whitewater investigation. Some of my colleagues in the last vote did not vote to continue it. They felt it was a waste of money. I felt it was important to continue it under the leadership of my chairman and my ranking member.

Why did I think it was important, and why do I think it is still important to continue this until it is done? Because I feel when allegations are thrown around here, either on this floor or in the press, it is very dangerous to allow those things to go unchallenged. So what we have is a committee that can look at these allegations, can bring the witnesses forward and can ascertain the facts. If we do not do it, then there are always going to be people out there who suspect wrongdoing, reputations will be ruined, and we will never get to the facts. So I support the work of this committee and continuing to do it in a bipartisan way.

That leads me to where we are today with the subpoena. I know, because I am very familiar with my chairman and my ranking member, that when those two get together and agree on something, they can move mountains. I find it hard to believe that if, in fact, the Republicans on the committee have agreed wholeheartedly to the conditions of the White House, which it appears to be so, that they cannot take it a step further, get together with the ranking member and counsel and sit down in a room with the other parties and reach an agreement.

Why do I say that? I say that because I believe to get into this confrontation in the courts is, at a minimum, going to delay matters. It is also going to cost more dollars, and I want to talk about that for a minute.

We are in a Government shutdown. We are in a government shutdown because it is so important to Republicans, particularly in the House at this point, that negotiations go just the way they want before they will allow the Government to continue operating. Frankly, I think it is embarrassing for the greatest Nation on Earth to have a partial shutdown of the Government because certain people act like children and will not do what we have to do, which is get a clean continuing resolution, keep the Government operational and take the argument over the long-term balancing of the budget into a room and figure it out. I voted for two balanced budgets in 7 years. Others have voted for other forms of balancing the budget. We can do it. Everyone is so concerned about spending money, but not the Republicans when it comes to this investigation.

It is incredible to me. Madam President, $1,350,000 has been spent thus far by the Senate committee; $10,000 a week on little TV sets they have all across that room—$10,000 a week. But they are worried about balancing the budget. So you take documents and instead of handing them out, you put them on a screen. You cannot really see it anyway. It is a waste of money, but money does not matter when it comes to Whitewater. But I suppose it was too hard for our committees to hold hearings on the drastic cuts in Medicare, where we did not hold any on this side and there was one held in the House. But when it comes to Whitewater, we can meet and meet and meet. And we can enforce the subpoenas and waste more taxpayer dollars and not get the documentation we want. I want to see those documents. It seems to me that if we support the alternative that will be offered by our ranking member today, Senator SARBANES of Maryland, we can get everything we want. We can avoid a costly subpoena battle. We can avoid, frankly, losing in the courts, which would harm the U.S. Senate out into the future, and we can get the information if we sit down together with our colleagues in the House. I served over there for 10 years. I think JIM LEACH and PAUL SARBANES, AL D'AMATO, and the other principals can sit down and figure this out. But, oh, no, we are bringing this to a confrontation. Most of my Republican friends have not even talked about that. They just talked about their view of Whitewater.

Money is no object when it comes to this, friends. So when you wonder why they are shutting down the Government and they tell you, ''Oh, my goodness, it is the only way we can get a balanced budget,'' ask them why we are going to spend all this money on Whitewater. I do not think you will get a very good answer.

Waco—hearings and hearings and hearings. Ruby Ridge—hearings and

hearings and hearings. Whitewater—more hearings. Medicare cuts—no hearings. One begins to think, are we only here to deal with politics, or are we here to deal with substance? So we face an unnecessary legal confrontation, it seems to me. I think that the ranking member, Senator SARBANES, is going to offer us a very wise way out, a way that would result in getting the papers that we need and keeping this away from the courts, which is always costly and time consuming.

When you look at what has been spent so far on Whitewater, it is staggering—$1.350 million in the Senate. I told you about the RTC investigation, which was $3.6 million. We just referred to the Stephens report, which just was a recommendation not to file a civil lawsuit against Bill Clinton. Then you have the independent counsel, which has cost $22 million to date, and 100 FBI agents, not only looking at this President and his family and all of his dealings now, but all the way back to campaigns for Governor, and everything else. Well, I will tell you, when this is over, this President and his family will have had more scrutiny than a chest x-ray. Every detail—$27 million total—without including what the House has spent. We do not know what they have spent because it is hidden in their Banking Committee.

We have had 32 hearings, or public meetings, of our Senate committee. So how anybody can say, we better rush and do this subpoena and get to court because we have not had enough meetings, enough information—I think, frankly, the people are losing faith in this Whitewater investigation, and I would not blame them. We do not listen to the impact of cutting Medicare and Medicaid and education and the environment and shutting down the Government. We do not do that. But there is hearing after hearing, millions of dollars after millions of dollars spent to do what? So that the Senator from North Carolina can get his wish and the First Lady is going to come before the Senate committee. After the Clintons have been exonerated in a $3 million study by Jay Stephens, our Republican former U.S. attorney.

Madam President, I was not on the floor when the Senator from Alabama spoke, Senator SHELBY, but I understand that he took quotes from Richard Nixon and Bill Clinton, and the whole implication is that—it is not hard to get to the bottom line —this is terrible, and this is going to result in the President resigning. That is the implication. Well, I have to say, we have seen more smoking guns in this investigation than I ever saw in a cowboy movie.

Smoking gun No. 1: Jean Lewis' testimony—this was their star. She was billed as their star, and she came before us to show how the administration has muzzled her investigation. As it turns out, her appearance only showed, in my view, how biased her investigation was. She even planned to profit from it by going into the T-shirt business. It was embarrassing to think of a professional woman, who was their star, who took phone calls about her T-shirt business in her office. This was their star. By the way, she said her tape recorder went on by itself, miraculously, and she taped, without her knowing, a woman from the RTC, and then she gave that tape over to the committee to show this other smoking gun which turned out to be not very much.

We also learned in that questioning period that this woman had a bias against the President. Oh, that caused a big brouhaha. She had written about the President in a negative fashion, in an obscene fashion, right before she made the referrals, which named the Clintons as possible witnesses. That is the number-one smoking gun, the No. 1 star of their show.

The second smoking gun: The letter from the President's lawyer—

Oh, I must say, sadly, Miss Lewis got ill in front of the committee. I hope she is better now, I really do. But I was not finished with my questioning. I do not know if I will ever have a chance to continue it because I had a lot more questions. But she became ill, clearly, and had to leave.

The second smoking gun: The letter from the President's lawyer, David Kendall, to the Rose firm attaching three Madison Guaranty files. Our committee chairman, in a public hearing, called the letter a ''smoking gun,'' in his words, alleging that the attached files were likely taken from the White House office of Vince Foster. Mr. Kendall testified that he had not gotten the files at all from Vince Foster's office.

The third smoking gun: The Small Business Administration's mishandling of the David Hale matter. That has been referred to by my friend from North Carolina.

Another smoking gun was the allegation that the SBA delayed the investigation of David Hale's misuse of SBA money. Well, my goodness, what did the testimony show? Not only did the SBA move forward aggressively, under Erskine-Boles, with the investigation, but Hale was indicted in record time—in record time—leading some members of the committee to say that is a model for all administrations to follow because the administrator knew that David Hale, who knew the President and the First Lady, was from Arkansas, and he said, go after them, and they did.

Smoking gun No. 4: The secret telephone number called by the First Lady the night of the Foster suicide. This hung out there in the press. Who did she call? A secret number. Nobody knows. The telephone company did not know. No one knew. The investigative team could not find out. Well, it was a big smoking gun. It was a phone number that was used when the White House switchboard was overloaded. It was a White House switchboard number. And the testimony from Bill Burton, who spoke to the First Lady, was exactly this: The First Lady called him at the specific time that the committee was after, and said, ''Please make sure that Vince Foster's mother is told this news in the most caring way, with her minister present, so that she does not learn of it through news reports.'' That was smoking gun No. 4. Maybe having a compassionate First Lady is a bad thing. I happen to think it is a good thing.

Smoking gun No. 5, the Jay Stephens report. There we were again. What is going to happen with this civil investigation? Are we going to see that the Clintons spent a lot of time with Whitewater?

Madam President, $3.6 million smoking gun. Well, it just came out. They said Whitewater had cost Madison Guaranty a minimal amount of $60,000 to $150,000. At most, there was a $60 million loss to the institution. The Clintons, as far as they could tell, did not know much about Whitewater, and there was no case. Do not proceed.

Now we come to smoking gun No. 6, and nearing the end of my comments today, the notes of White House counsel William Kennedy. The notes were taken when the President's lawyers met together when they were handing over the information to the private attorney. The undercurrent that has been out there is the President has something to hide, except for one thing. They are ready to hand over the papers. They are ready to hand over the papers. First, they had five conditions. They are down to one condition. Down to one condition. We have agreed with that condition in a bipartisan fashion. We think the independent counsel has, although we have not confirmed it. That is our belief. Which leaves the House.

Now I know those people over in the House, and I like them. I think we ought to talk to them face to face and get them to understand that by taking the position they are taking, we are not going to get the papers.

Why do we want to have a court fight that would set a bad precedent? It does not make sense. All individuals have an attorney-client privilege. It does not matter whether you are the poorest of the poor, the richest of the rich, the most powerful or the least powerful. That is what is so great about our country. We do not go on political witch hunts and deny people their rights.

In this U.S. Senate in the Ethics Committee on the PACKWOOD case, Republicans and Democrats together said that the attorney-client privilege for Bob Packwood must take precedence. So I have got to be a little surprised when that occurs in the Ethics Committee, and we are bipartisan, and suddenly here we are splitting into Democrats and Republicans. That is bad for this institution. It is bad for this investigation. It is bad for the precedence of the United States. Frankly, I think it is bad for individual Senators.

Who knows some day when one of us might say, I do not want people to see the private notes of my attorney on a divorce. I do not want someone to see the private notes of my attorney in a child custody case, or an ethics proceeding, or any kind of matter where we may be involved.

We should stand together on the principle as we did in the Packwood case, and we know emotions were running high in that case, but we did not invade that attorney-client privilege, as our ranking member, Senator SARBANES, has pointed out far more eloquently than I because I am not a lawyer. I am just trying to bring some common sense to the discussion and to move along the process of the committee's work and getting the notes that we want to get.

I think we should send the resolution back to the committee with instructions to consider all reasonable ways of obtaining the notes. I think that we can do it. I have seen my chairman and my ranking member team up and be very persuasive, and I think if they teamed up on this and they sat down with their counterparts in the House, we could resolve this in a moment's time. That is the faith I have in their ability to work together.

The bottom line is, do you want to get the notes or do you want to play politics? That is the way I see it. I hope we decide we want to get the notes, we want to do it in a way that keeps this committee working in a bipartisan fashion because, frankly, if we do not stick together on this, on the procedures, I think the American people are going to think this is all politics and all the hard work that we do to put light on this subject will simply not be respected.

Thank you. I yield the floor.

Mr. HATCH. Madam President.

Mr. FAIRCLOTH. Will the Senator yield?

Mr. HATCH. Without losing my right to the floor, and I ask unanimous consent in that regard.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. FAIRCLOTH. Very briefly, I reply to the honorable Senator from California. I do not intend to get into a point-by-point debate.

Mrs. Clinton has admitted while Jim McDougal was on trial in 1990, she took over Whitewater affairs. She even sought power of attorney in 1988. In fact, the Clintons have all of the Whitewater documents. They were so active that they had to turn back boxes of documents to Jim McDougal so he could do the return.

Finally, the reason Pillsbury Madison might have said there was no wrongdoing, they simply do not have the information that has been available to this committee and will be available to the committee.

To answer one three-line quote, and I am quoting Mrs. Clinton as to her involvement in Whitewater, her words:

Because my husband was a fourth owner of Whitewater Development Company while he was actually occupied as Governor of Arkansas, it fell to me to take certain steps to attempt to assure that Whitewater Development Corporation affairs were properly conducted and that they complied with the law.

If that does not involve her, I do not know what does. I thank the Senator from California.

Mrs. BOXER. If the Senator would yield for 30 seconds.

Mr. HATCH. Under the same unanimous-consent request.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mrs. BOXER. I say to my friend from North Carolina, and I respect his right to hold any view he wishes, what he said is, essentially, that he does not agree with the conclusion of this report.

I just want to reiterate, Madam President, that $3 million was spent on it. It was headed by a very well-respected Republican former U.S. attorney, James Jay Stephens. Clearly, it says, ''The evidence does not suggest the Clintons had managerial control of the enterprise or even received annual reports or financial summaries. Instead, the main contact seems to consist of signing loans and renewals.''

To suggest some 3-point-some million dollars they spent here did not give them the information they need is, really, it seems to me, an indirect hit at Mr. Stephens and Pillsbury Madison & Sutro. I take great pride in that law firm because that is in San Francisco. I think the facts do not bear out the intentions.

Mr. BYRD. Madam President, the distinguished Senator from Utah was on the floor before I was here. It is not a great matter of importance that I speak immediately, but I do have some other things that are going to demand my attention later. I wonder if the distinguished Senator from Utah could tell me how long he might be speaking?

Mr. HATCH. I do not believe I will be very long, and I am happy to yield to my distinguished colleague, but I ask unanimous consent that he be permitted to speak immediately following my remarks, which should not be too long.

Mr. BYRD. That would be very fine.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BYRD. I thank the distinguished Senator for his characteristic courtesy. Could he tell me about when he might end?

Mr. HATCH. I do not think I will be much more than 15 minutes. Pretty close to 3 o'clock, maybe a little less than that.

Mr. BYRD. I hope the Senator will not hurry.

Mr. HATCH. I appreciate my colleague. I am happy to yield to him.

Mr. SARBANES. If the Senator would yield, given the agreement, maybe we could even put in a quorum call if it catches the Senator from West Virginia unaware at the conclusion of the time. I am sure that is agreeable to the chairman.

Mr. D'AMATO. Why do we not say—we have been trying to work this back and forth, and certainly the Senator from West Virginia would be recognized, and if he needs an opportunity to come to the floor, and I make an observation I would yield immediately. Why do we not just keep it at that, and he will be recognized thereafter or as soon as he comes to the floor.

Mr. BYRD. I thank the Senator from New York and I thank the Senator from Maryland.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. I appreciate the action of my friend from West Virginia because I know how busy he is, as all of us are, and my friends who are managing this bill. I think I would always yield to him, if I could. But he has been gracious enough to ask me to go forward.

It has been implied in this debate that I have been listening to that the Whitewater investigation has been a waste, that it has been too costly and too expensive. I have to say, I did not hear the same arguments during the Iran-contra problem. But let me say, I would note that the Whitewater investigation has resulted in five indictments, including the indictment of a sitting Governor, and nine guilty pleas so far.

We have also seen the No. 3 person at the Justice Department go to Federal prison. I personally feel badly about that because I liked him very much. I still like him very much and I am sorry he has had that difficulty. But I have to say, it shows that the Whitewater investigation has not been in vain, that it has been extremely important.

Frankly, the investigation is not complete. I wonder how much all of that work is worth to the country. It seems to me the American people would want to investigate wrongdoing. I think the record shows that the independent counsel is moving ahead in an appropriate manner. And I believe the distinguished committee on Whitewater is moving ahead very well, too. I commend the two leaders, Senators D'AMATO and SARBANES, for the good way that they worked together and the tremendous amount of work they have done on this—plus their counsel. Their respective counsel have been as good as any I have ever seen.

Having said that, Madam President, I rise in support of the resolution to authorize enforcement of the subpoena to obtain notes from a White House meeting concerning Whitewater. I do not take this step lightly, however. As chairman of the Judiciary Committee, I see it as my duty to defend the prerogatives of the executive branch and the separation of powers. Indeed, I recognize that the executive branch has a right to confidential communications regarding its core functions. After giving this issue careful thought and consideration, however, I have decided that enforcing the subpoena is the proper course of action to take. This

issue transcends claims of partisanship and goes to the very constitutional authority of Congress to investigate wrongdoing at the highest levels of Government.

The Senate has a constitutional obligation to conduct oversight hearings. It is a duty we must not surrender. The President has refused to comply with a legitimate request to obtain information relating to Whitewater. After President Clinton's initial refusal to provide the meeting notes, the Special Whitewater Committee took the wholly appropriate step of subpoenaing the notes. It is unfortunate that the President has chosen to resist the congressional subpoena. Not only has President Clinton defied a Congress that is in good faith attempting to investigate a matter of great public concern, he has chosen to do so by hiding behind a questionable claim of attorney-client privilege.

I would like to review the claim of privilege the President is asserting and explain to the American people why it is simply not credible.

First, the President not only claims that the November 5 Whitewater meeting is cloaked in attorney-client privilege, but that the privilege applies against Congress. No Congress in history, however, has recognized the existence of a common-law privilege that trumps the constitutionally authorized investigatory powers of Congress. While Congress has chosen, as a matter of discretion, to permit clear, legitimate claims of privilege, it has never allowed its constitutional authority to investigate wrongdoing in the executive branch to be undermined by universal recognition of the attorney-client privilege. As Senator SARBANES has noted, we have chosen, in our discretion, to recognize the privilege with respect to some of the witnesses who have testified before the Committee.

The attorney-client privilege exists as only a narrow exception to broad rules of disclosure. And the privilege exists only as a statutory creation, or by operation of State common law. No statute or Senate or House rule applies the attorney-client privilege to Congress. In fact, both the Senate and the House have explicitly refused to formally include the privilege in their rules. As the Clerk of the House stated in a memorandum opinion in 1985: ''attorney-client privilege cannot be claimed as a matter of right before a congressional committee.'' The attorney-client privilege is a rule of evidence that generally applies only in court; it does not apply to Congress which, under article I, section 5 of the Constitution, has the sole authority to ''determine the Rules of its Proceedings.''

The historical practice of congressional committees has borne this out. As Joseph diGenova, a special counsel and former U.S. attorney, has pointed out in an article in today's Wall Street Journal, as early as in the 19th century investigation of the Credit Mobilier scandal, Congress clearly refused to recognize attorney-client privilege. Indeed, in 1934, Senator Hugo Black, later one of the Supreme Court's great liberal justices, as chairman of a committee refused to recognize the privilege. As recently as 1986, a House subcommittee, Committee on Foreign Affairs, Subcommittee on Asian and Pacific Affairs, took pains to note that it need not recognize the privilege asserted by individuals involved in setting up a web of dummy corporations for the Marcos family.

This body cannot simply take the President's claim of privilege against Congress at face value. To do so would be to surrender an important constitutional obligation. We can not compromise the ability of the Congress to conduct investigatory hearings. I ask my colleagues on the other side of the aisle to place partisan politics aside and to support the institutional integrity of this body.

Second, the President has stated that he is merely asserting the type of attorney-client privilege that any American would claim with respect to his or her own attorney. I do not think that any of us would disagree that Mr. Clinton, as a private citizen dealing with personal legal troubles, has a claim of attorney-client privilege. That goes without saying. Certainly with regard to Mr. Kendall, his personal attorney.

The problem, however, is that we do not have an ordinary citizen here, nor are we in a court of law. An ordinary citizen does not supervise the law enforcement resources of the Federal Government; an ordinary citizen does not appoint or fire U.S. attorneys; an ordinary citizen does not direct the FBI; an ordinary citizen does not control IRS or the RTC. An ordinary citizen is not in the position to interfere with the legitimate law enforcement investigation of his own activities.

Indeed, President Richard Nixon did not assert attorney-client privilege. What would have happened if President Nixon had attempted to use the privilege to prevent White House counsel John Dean from testifying? That is essentially what is happening now. Even during the so-called Iran-Contra affair, Department of Justice lawyers concluded that the privilege could only be claimed by lawyers preparing for litigation, not preparing for congressional inquiries. Although the committee recognized attorney-client privilege for Oliver North and certain others, it did so only as a matter of discretion, which the committee has a right to do.

Thus, if we are going to recognize any attorney-client privilege of the President, we do so at our discretion. Now, in general I would be willing to recognize the privilege when it validly exists. Here, however, it clearly does not, and so Congress must issue the resolution to enforce the subpoena.

Courts recognize the privilege only for communications between a client and his attorney for the purpose of providing legal advice. It makes perfect sense that a person would be able to discuss legal matters with his or her lawyer that should not be revealed in court or to the opposing side. That is a well-established principle we can all agree with.

I, as well as legal experts such as former U.S. Attorney General William Barr, former U.S. Attorney Joseph diGenova, and Prof. Ronald Rotunda fail to see how Mr. Clinton can assert privilege over the November 1993 meeting. It is hard for me to understand how advice about a private legal matter could be given at a meeting where neither the President nor the First Lady were present.

An additional problem is that in addition to Mr. Kennedy and Mr. Kendall, other lawyers were at the meeting who represented the President in his official capacity. These White House lawyers had a duty to represent the American people as well as the Office of the President. It would be a violation of the basic ethical rules for Government lawyers to work on private legal matters for the President. A memo from the President's personal lawyers at Williams & Connolly concedes that each group of lawyers—the Government lawyers and the private lawyers—had a different client: the Government lawyers represented the Office of the President and the U.S. Government, the private lawyers represented the President in his personal capacity. Since they are representing different entities, they cannot share the same attorney-client privilege.

The administration responds to this straightforward legal point by drawing an analogy to the common-interest privilege that is given to coconspirators who are permitted to share advice and information in preparing a joint defense. This analogy collapses upon close examination. The supposed common interest is that both clients represented at the November 5 meeting—the Clintons in their private capacity and the Office of the President—faced adversarial legal proceedings. But in this setting, the only possible adversary for the Clintons is the U.S. Government, and one group of lawyers at the November 5 meeting—those representing the Office of the President, represent the U.S. Government, and were on the payroll of the U.S. Government.

Therefore, the U.S. Government and those lawyers who represented it could not possibly have a common interest with the Clintons in thwarting or defending against adversarial legal proceedings brought or potentially to be brought by the U.S. Government against the Clintons in their private capacities. In fact, the lawyers from the White House Counsel's Office represented the only possible adversaries of the President, and therefore there could not have been a common interest between the two groups of lawyers.

In fact, there is no claim that Whitewater involves the Office of the President; the issues should not involve the Presidency at all. At the

time that the Whitewater affair occurred, Mr. Clinton was not even President. It is hard to say that the Office of the Presidency was facing any adversary, with whom it would need to coordinate a common defense.

The White House, in a memorandum provided to the special committee, claims that this was a meeting in which the President's former private attorney, Mr. Kennedy, was handing off information to his newly retained counsel, Mr. Kendall. The White House's lawyers claim that they were serving necessary and important public interests at the meeting, and that they were at the meeting to ''impart information that had been provided to them in the course of official duties.'' What information was imparted? Surely the transmission of Government information to private attorneys is not protected by the attorney-client privilege.

I am deeply troubled by the fact that White House lawyers were present at this meeting. After all, these lawyers do not represent the President in his personal capacity. I am concerned about the possibility that Government lawyers, who have an obligation to the American people, as well as to the President, may have passed information to the Clinton's personal lawyers that the White House Counsel's Office may have gained through their official capacities. Is it the proper role of Government officials to act as messengers for Mr. Clinton in his private capacity to the President's private lawyers?

These lawyers were discussing Whitewater matters that were being investigated by the Department of Justice and the RTC—legal matters that would place Mr. Clinton in an adverse position to the U.S. Government. Essentially, Mr. Clinton is claiming attorney-client privilege over a meeting in which Government lawyers may have been involved in a strategy session to frustrate investigations conducted by other parts of the executive branch. I hope that nothing occurred during the meeting that would in any way sully the Office of the President. But to find out whether anything illegal occurred, the President must disclose the notes.

It is also likely that even if a privilege may have existed, it was waived. After all, Bruce Lindsey, who did not serve in the White House Counsel's Office at this time, but rather served in the White House Personnel Office, was at the meeting. He was not legal counsel to the President in either a personal or a professional capacity. To say that he represented the Office of the President as legal counsel at this meeting is dubious at best. Information discussed in his presence thus would constitute a waiver of the privilege. Were this legal fiction to survive judicial review, virtually any discussions or conspiracies involving lawyers could be claimed as privileges.

In order to avoid the brewing constitutional confrontation that will arise when this issue goes to court, I call upon the President to release the notes of the November 5 meeting now. It is in the best interests of the President, of the Congress, and, indeed, of the American people, for all the information concerning Whitewater to come out into the open. As Justice Louis Bradeis put so succinctly: ''Sunlight is the best of disinfectants.'' By being forthcoming with the American people, President Clinton can begin to put Whitewater behind this administration. While we must, in my opinion, vote today to enforce the subpoena, I would hope that we will not ultimately have to resolve this dispute in court. I would hope that the President would do as he has long promised: fully comply with the investigation into the Whitewater affair.

Having said all of that, again I note that this has not been a waste of time—the work these two leaders on the committee have done, the work the special counsel has done which has resulted in five indictments, nine guilty pleas, and the imprisonment of one of our top Justice Department officials.

I think those facts alone justify the work that the distinguished chairman of this committee has been trying to do.

So I want to commend him for the work he is doing, and I want to commend all members of committee for the attention that they have given to this work. And I hope that some of the comments that I have made will help on this matter.

I yield the floor.

Mr. D'AMATO. Madam President, let me, before Senator BYRD comes to the floor, first of all thank the Senator from Utah who also in his capacity as chairman of the Judiciary Committee has a keen insight, has been here and understands this area that sometimes might be somewhat difficult for people to grasp. But I think in the summation he went right to the heart of this matter. It is a matter of the President of the United States keeping faith with his commitment to the people, a matter of the President of the United States, President Clinton, keeping faith not only with the people but indeed with the Congress and the Senate. It is a matter of the President of the United States keeping faith with the commitment that he made on March 8. On March 8, 1994, the President held a press conference in connection with the appointment of Lloyd Cutler as interim White House counsel. During that press conference the President was asked about the possibility of asserting Executive privilege, and he gave a response. He said:

It is hard for me to imagine a circumstance in which that would be the appropriate thing for me to do.

Madam President, once again, the President has an opportunity to keep his commitment. It is not good enough to say one thing and to do another. It is not good enough to promise us cooperation and then hide behind technicalities. It is not good enough to say that I will produce everything that I can to be cooperative and getting to the bottom of this matter, and then assert privilege—and then put conditions on it and do it in a manner in which we are forced to come to this floor.

So I would hope that irrespective of the votes that we take, irrespective of our positions, that the President would come forward—and come forward now and make those notes available. People have a right to know the Congress has a right to know, and we have worked in the cooperative effort to avoid this. It is only because of the necessity to see to it that we get this information in a timely way, that we have taken this extraordinary action.

So I agree with Senator HATCH. The duty and the obligation is not upon this Senate. We should not have to be compelling this. It should be President of the United States who steps forward and who keeps his commitment; a commitment that right now he is failing to observe, a promise that has been made, a promise that has been made but a promise that has not been kept.

Mr. SARBANES. Will the chairman yield?

Mr. D'AMATO. I certainly will. I note that we are awaiting Senator BYRD because he is the next scheduled person, but certainly I will yield. Have we made inquiry? Has the Senator been advised?

Mr. SARBANES. We have sent a message to him and he is on his way, is what I am told.

The PRESIDING OFFICER. The Senator from Maryland.

Mr. SARBANES. Madam President, I ask unanimous consent to have printed in the RECORD at this point, in light of the comments we just heard, a letter to Chairman D'AMATO from Jane Sherburne, special counsel to the President.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

THE WHITE HOUSE,
Washington, December 20, 1995.

Hon. ALFONSE M. D'AMATO,
Chairman, U.S. Senate, Special Committee to Investigate Whitewater Development Corporation and Related Matters, Washington, DC.

DEAR CHAIRMAN D'AMATO: As I informed you yesterday we would, Counsel for the President have undertaken to secure non-waiver agreements from the various entities with an investigative interest in Whitewater-Madison matters. I requested an opportunity to meet with your staff to determine how we might work together to facilitate this process. Mr. Chertoff declined to meet.

Nonetheless, we have succeeded in reaching an understanding with the Independent Counsel that he will not argue that turning over the Kennedy notes waives the attorney-client privilege claimed by the President. With this agreement in hand, the only thing standing in the way of giving these notes to your Committee, is the unwillingness of Republican House Chairmen similarly to agree. As I am sure you are aware, two of the Committee Chairmen who have asserted jurisdiction over Whitewater matters in the House have rejected our request that the House

also enter a non-waiver agreement with respect to disclosure of these notes and related testimony.

We have said all along that we are prepared to make the notes public; that all we need is an assurance that other investigative bodies will not use this as an excuse to deny the President the right to lawyer confidentiality that all Americans enjoy. The response of the House Committee Chairmen suggests our concern has been well-founded.

If your primary objective in pursuing this exercise is to obtain the notes, we need to work together to achieve that result. You earlier stated that you were willing to urge the Independent Counsel to go along with a non-waiver agreement. We ask that you do the same with your Republican colleagues in the House. Be assured: as soon as we secure an agreement from the House, we will give the notes to the Committee.

Mr. Chertoff has informed me that the Committee will not acknowledge that a reasonable claim of privilege has been asserted with respect to confidential communications between the President's personal lawyer and White House officials acting as lawyers for the President. In view of the overwhelming support expressed by legal scholars and experts for the White House position on this subject, we are prepared simply to agree to disagree with the Committee on this point.

Accordingly, the only remaining obstacle to resolution of this matter is the House.

Sincerely yours,

JANE C. SHERBURNE,
Special Counsel to the President.

Mr. SARBANES. I thank the Chair.

She indicates in the letter that the President is prepared to turn over these notes as soon as they can achieve a formal waiver agreement with the House. They have such an agreement with our committee. We have indicated that is acceptable to us. And they apparently reached such an understanding with the independent counsel. In fact, this letters says:

We have succeeded in reaching an understanding with the independent counsel that he will not argue that turning over the Kennedy notes waives the attorney-client privilege claimed by the President. With this agreement in hand, the only thing standing in the way of giving these notes to your committee is the unwillingness of Republican House chairmen similarly to agree.

I understand they are going to be meeting with the House chairmen this afternoon, and hopefully out of that an understanding can be reached because the White House has indicated they are prepared to turn these notes over if they can get these agreements. They have an understanding with our committee; they have an understanding with the independent counsel, and the other relevant body where they need an understanding is with the House committees. And I gather that matter is being worked on, and hopefully it will be worked on in a successful way.

So I just wanted to enter this letter into the RECORD and make those comments in light of the observations that were just made.

I notice that Senator BYRD is in the Chamber.

I would like to say to the chairman, I take it Senator GRAMS would seek recognition next, is that correct, after Senator BYRD?

Mr. D'AMATO. Correct. Yes.

Mr. SARBANES. Could we then recognize Senator LEAHY after Senator GRAMS?

Mr. D'AMATO. Certainly.

Mr. SARBANES. I ask unanimous consent that following Senator BYRD, Senator GRAMS be recognized and following Senator GRAMS, Senator LEAHY be recognized.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. D'AMATO addressed the Chair.

The PRESIDING OFFICER. The Senator from New York.

Mr. D'AMATO. If I might intrude for 30 seconds upon my friend and colleague from West Virginia, I think it is important to note I mentioned that on March 8 the President had a press conference made in connection with the appointment of Lloyd Cutler and specifically as it related to the question of bringing up privilege said it was hard for him to imagine any circumstance which would be appropriate.

That this took place almost 4 months to the day after, 4 months and 3 days after this meeting, it is inconceivable that the President was not aware of this meeting where his personal attorneys were in attendance. So this is not a question—it seems to me this would not be an extraordinary circumstance. This was the circumstance and the fact he was aware of when he indicated that he would not raise the issue of privilege.

I just thought it was important to note that for the RECORD. I yield the floor.

Mr. BYRD addressed the Chair.

The PRESIDING OFFICER (Mr. GORTON). The Senator from West Virginia is recognized under the previous order.

Mr. BYRD. Mr. President, I thank the Chair.

Mr. President, has the Pastore rule run its course?

The PRESIDING OFFICER. The Pastore rule has run its course.

Mr. BYRD. I thank the Chair. Then I shall speak out of order, that being my privilege, in view of the fact that there is no controlled time at the moment.

Mr. President, I speak today with apologies to the two managers of the pending resolution.

Mr. President, I should also state to Senators that I expect to speak for no less than 45 minutes.

CIVILITY IN THE SENATE

Mr. BYRD. Mr. President, I speak from prepared remarks because I wanted to be most careful in how I chose my words and so that I might speak as the Apostle Paul in his epistle to the Colossians admonished us to do:

Let your speech be always with grace, seasoned with salt, that ye may know how ye ought to answer every man.

Mr. President, I rise today to express my deep concern at the growing incivility in this Chamber. It reached a peak of excess on last Friday during floor debate with respect to the budget negotiations and the Continuing Resolution. One Republican Senator said that he agreed with the Minority Leader that we do have legitimate differences. ''But you do not have the guts to put those legitimate differences on the table,'' that Senator said. He went on to state, ''and then you have the gall to come to us and tell us that we ought to put another proposal on the table.'' Now, Mr. President, I can only presume that the Senator was directing his remarks to the Minority Leader, although he was probably including all members on this side of the aisle. He also said that the President of the United States ''has, once again, proven that his commitment to principle is non-existent. He gave his word; he broke his word. It is a habit he does not seem able to break.''

Mr. President, I do not know what the matter of ''guts'' has to do with the Continuing Resolution or budget negotiations. Simply put, those words are fighting words when used off the Senate floor. One might expect to hear them in an alehouse or beer tavern, where the response would likely be the breaking of a bottle over the ear of the one uttering the provocation, or in a pool hall, where the results might be the cracking of a cue stick on the skull of the provocator. Do we have to resort to such language in this forum? In the past century, such words would be responded to by an invitation to a duel.

And who is to judge another person's commitment to principle as being nonexistent?

I am not in a position to judge that with respect to any other man or woman in this Chamber or on this Earth.

Mr. President, the Senator who made these statements is one whom I have known to be amiable and reasonable. I like him. And I was shocked to hear such strident words used by him, with such a strident tone. I hope that we will all exercise a greater restraint upon our passions and avoid making extreme statements that can only serve to further polarize the relationships between the two parties in this Chamber and between the executive and legislative branches. By all means, we should dampen our impulses to engage in personal invective.

Another Senator, who is very new around here, made the statement—and I quote from last Friday's RECORD: ''This President just does not know how to tell the truth anymore,'' and then accused the President of stating to ''the American public—bald-faced untruths.'' The Senator went on to say that, ''we are tired of stomaching untruths over here. We are downright getting angry over here''—the Senator was speaking from the other side of the aisle. Then with reference to the President again, the Senator said, ''This guy is not going to tell the truth,'' and then proceeded to accuse the President ''and many Senators''—''and many Senators''—of making statements that